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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN MINING CONGRESS and SOLITE CORPORATION,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
EDWARD M. GREEN, ESQ.
Chief Counsel
RODERICK T. DWYER, ESQ.
Senior Counsel
American Mining Congress
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 861-2800

JOHN N. HANSON, ESQ.
Counsel of Record
DONALD J. PATTERSON, JR., ESQ.
AARON H. GOLDBERG, ESQ.
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Petitioner American Mining Congress

JEREMIAH J. JEWETT, III, ESQ.
MCGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219
(804) 774-1005

Attorney for Petitioner Solite Corporation

March 27, 1990

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104

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit erred by allowing the Environmental Protection Agency summarily to subject wastes from three important sectors of the United States economy to the most costly and burdensome requirements of Subtitle C of the Resource Conservation and Recovery Act without first making a formal regulatory determination as mandated by Congress that those requirements are warranted.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the case below were as follows:

American Mining Congress, Solite Corporation, American Iron and Steel Institute, Waste Management of North America, Inc., Chemical Waste Management, Inc., PPG Industries, Inc., Inland Steel Company, Edison Electric Institute,[1] National Rural

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[1] Edison Electric Institute's member companies were also listed on Edison Electric Institute's Petition for Review as petitioners. Those member companies are: American Electric Power Service Corporation, Appalachian Power Company, Atlantic City Electric Company, Baltimore Gas & Electric Company, Boston Edison Company, Carolina Power & Light Company, Centerior Energy Corporation, Central Hudson Gas & Electric Corporation, Central Illinois Light Company, Central Illinois Public Service Company, Central & South West Services, Inc., Cincinnati Gas & Electric Company, Columbus Southern Power Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Dayton Power & Light Company, Delmarva Power & Light Company, Duke Power Company, Duquesne Light Company, Florida Power & Light Company, Houston Lighting & Power Company, Illinois Power Company, Indiana Michigan Power Company, Indianapolis Power & Light Company, Iowa Power & Light Company, Iowa Public Service Company, Jersey Central Power & Light Company, Kentucky Power Company, Madison Gas & Electric Company, Minnesota Power & Light Company, Monongahela Power Company, Montaup Electric Company, New England Power Company, Niagara Mohawk Power Corporation, NIPSCO Industries, Inc., Northeast Utilities Service Company, Ohio Power Company, Ohio Valley Electric Corporation, Oklahoma Gas & Electric Company, Pacific Gas & Electric Company, Pacificorp dba Pacific Power & Light and Utah Power & Light, Pennsylvania Power & Light Company, Philadelphia Electric Company, Potomac Electric Power Company, Public Service Company of Indiana, Inc., Public Service Electric & Gas Company, Salt River Project Agricultural Improvement & Power District, Southern California Edison Com-

Electric Cooperative Association, and American Public Power Association, petitioners;

United States Environmental Protection Agency and Lee M. Thomas, Administrator, respondents;

American Petroleum Institute and The Fertilizer Institute, intervenors; and

Hazardous Waste Treatment Council, *amicus curiae*.

Petitioner American Mining Congress is an industry trade association with no publicly owned parent, subsidiary or affiliate.

Petitioner Solite Corporation has no publicly owned parent, subsidiary or affiliate.

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pany, Southern Company Service, Inc., Tampa Electric Company, Texas Utilities Electric Company, The Detroit Edison Company, The Potomac Edison Company, Union Electric Company, Virginia Electric and Power Company, West Penn Power Company, Wisconsin Electric Power Company, Wisconsin Power & Light Company, and Wisconsin Public Service Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTORY AND REGULATORY PROVISIONS	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Statutory Provisions	4
1. Subtitle C of RCRA	4
2. The Bevill Amendment and Section 3004(x)	5
C. Regulatory Determinations	7
D. The Rulemaking At Issue	8
E. The Decision Below	9
REASONS FOR GRANTING THE WRIT	10
I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE IMPORTANT SECTORS OF UNITED STATES INDUSTRY HAVE BEEN DENIED THE SPECIAL PROCEDURAL AND SUBSTANTIVE PROTECTIONS MANDATED BY CONGRESS	10
A. The Decision Below Violates The Clear Admonition Of This Court That Reviewing Courts Must Give Effect To The Plain Language Of Statutory Provisions	11
B. Section 3004(x) Of The 1984 RCRA Amendments Confirms That The Court of Appeals Has Violated The Plain Language Of The Bevill Amendment	14

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW EVISCERATES THE SPECIAL REGULATORY APPROACH THAT CONGRESS ESTABLISHED AS AN ESSENTIAL SAFEGUARD AGAINST UNNECESSARY OR INAPPROPRIATE REGULATION OF IMPORTANT INDUSTRIES 17

A. The Court of Appeals' Decision Exposes Bevill Industries To Devastating Economic Burdens Without The Congressionally Required Regulatory Determination That Those Burdens Are Warranted 17

B. The Court of Appeals' Decision Eviscerates EPA's Regulatory Determination That Mining Industry Extraction and Beneficiation Wastes Should Not Be Subject To Corrective Action Requirements Under Subtitle C of RCRA 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page

American Iron and Steel Institute v. United States Environmental Protection Agency, 886 F.2d 390 (D.C. Cir. 1989) ..... *passim*

American Mining Congress v. United States Environmental Protection Agency, 824 F.2d 1177 (D.C. Cir. 1987) 14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 10,11

Environmental Defense Fund v. United States Environmental Protection Agency, 852 F.2d 1309 (D.C. Cir. 1988) ..... *passim*

Environmental Defense Fund v. United States Environmental Protection Agency, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989) 8

Morton v. Mancari, 417 U.S. 535 (1974) 19

Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1988) 10

Tull v. United States, 481 U.S. 412 (1987) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 10

United States v. Temple, 105 U.S. 97 (1881) 14

Statutes:

42 U.S.C. §§ 6921-6939b 4

42 U.S.C. § 6921(b)(2) 5

42 U.S.C. § 6921(b)(3)(A) 6,13

42 U.S.C. § 6921(b)(3)(C) 6,13

42 U.S.C. § 6924(u) 5

42 U.S.C. § 6924(x) 7,15

42 U.S.C. § 6982(f) 6

Table of Authorities Continued

	Page
42 U.S.C. § 6982(m)	5
42 U.S.C. § 6982(n)	6
42 U.S.C. § 6982(o)	6
42 U.S.C. § 6982(p)	6
Legislative History:	
125 Cong. Rec. 13,244 (1979)	17
126 Cong. Rec. 3361 (1980)	18
Regulations:	
40 C.F.R. Parts 260-272 (1989)	4
50 Fed. Reg. 28,702 (1985)	18
51 Fed. Reg. 24,496 (1986)	6,7,20
52 Fed. Reg. 45,788 (1987)	3,8,17
53 Fed. Reg. 35,412 (1988)	8
54 Fed. Reg. 15,316 (1989)	8
54 Fed. Reg. 36,592 (1989)	8
54 Fed. Reg. 45,272 (1989)	20
55 Fed. Reg. 2322 (1990)	8
Miscellaneous:	
1A Sutherland, *Statutory Construction* § 23.09 (4th ed. 1985)	19
Options Paper: *Development of a Regulatory Program for Corrective Action Under Section 3004(u)*, attached to Memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response (Jan. 8, 1987)	16
EPA Report to Congress: *Wastes from the Combustion of Coal by Electric Utility Power Plants*, Exec. Commun. No. 3113, 134 Cong. Rec. H827 (February 1988)	18
U.S. EPA, Outline of RCRA Subtitle D Mining Waste Strawman (May 31, 1988 draft)	20

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners American Mining Congress and Solite Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on September 22, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") is reported in *American Iron and Steel Institute v. United States Environmental Protection Agency*, 886 F.2d 390 (D.C. Cir. 1989) ("*AISI v. EPA*"), and is reprinted in the Appendix at 1a. The

orders of the Court of Appeals denying rehearing and denying rehearing *en banc* are not reported. These orders are reprinted in the Appendix at 27a and 28a, respectively.

JURISDICTIONAL STATEMENT

Petitioners filed petitions for review in the Court of Appeals pursuant to section 7006(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976(a). The judgment in this case was entered on September 22, 1989. Petitioners' motion for panel rehearing and suggestion for rehearing *en banc* were denied by the Court of Appeals on November 27, 1989. On February 15, 1990, Chief Justice Rehnquist of this Court granted the motion of Edison Electric Institute, *et al.*, American Mining Congress, Solite Corporation, and American Petroleum Institute for an extension of time in which to file a petition for writ of certiorari to March 27, 1990. This petition for a writ of certiorari has therefore been timely filed. This Court's jurisdiction to review the judgment and opinion of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This case concerns a United States Environmental Protection Agency ("EPA" or "the Agency") rulemaking pursuant to RCRA, 42 U.S.C. § 6901-6992k. The statutory provisions at issue in this case are RCRA sections 3001(a), (b), 42 U.S.C. §§ 6921(a), (b); 3004(u), (x), 42 U.S.C. §§ 6924(u), (x); and 8002(f), (n), (o), (p), 42 U.S.C. §§ 6982(f), (n), (o), (p). These provisions are reprinted in the Appendix at 30a-38a. The

EPA rulemaking at issue in this case was published at 52 Fed. Reg. 45,788 (1987). The relevant portion of this notice is reprinted in the Appendix at 58a.

STATEMENT OF THE CASE

A. Introduction

By this Petition, this Court is asked to review a decision by the Court of Appeals upholding a rule promulgated by EPA that summarily imposes extremely burdensome RCRA Subtitle C "corrective action" (*i.e.*, cleanup) requirements on wastes generated by petitioners, even though the plain language of RCRA specifically prohibits EPA from imposing those requirements without first performing a special study of the wastes and making a formal Regulatory Determination that such Subtitle C controls are warranted.

In 1980, Congress enacted the so-called "Bevill Amendment" to RCRA that precluded EPA from imposing Subtitle C regulatory controls on three important sectors of the United States economy until the Agency followed a special set of procedural and substantive requirements to determine whether Subtitle C regulatory controls for those wastes are warranted. Congress mandated these Bevill Amendment special review requirements for wastes from the mining, utility, and cement kiln industries because those wastes generally pose a lower environmental risk and are produced in significantly greater volumes than the typical industrial and manufacturing wastes covered by Subtitle C.

The Court of Appeals' decision upholds EPA's imposition of Subtitle C corrective action requirements

on Bevill wastes generated by petitioners, even though EPA has not followed the Bevill Amendment process and determined that those requirements are warranted. The Court of Appeals' decision conflicts with the plain language of RCRA and unlawfully exposes Bevill wastes to the most costly of Subtitle C regulatory controls.

B. Statutory Provisions

1. Subtitle C of RCRA

Subtitle C of RCRA,[1] which was enacted by Congress in 1976 and amended in 1980 and 1984, establishes a detailed regulatory system that governs the management of hazardous wastes from "cradle to grave."[2] The Subtitle C regulatory program regulates the generation, transportation, treatment, storage, and disposal of hazardous wastes.[3] It imposes costly and detailed administrative and technical performance standards on facilities managing hazardous wastes. Included among these requirements are the "corrective action" (*i.e.*, cleanup) requirements under section 3004(u) of Subtitle C.

Section 3004(u) was enacted as part of the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). Section 3004(u) dramatically expanded the pre-existing cleanup authority of Subtitle C, requiring any facility seeking a hazardous waste permit to undertake corrective action for releases of hazardous

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[1] 42 U.S.C. §§ 6921-6939b.

[2] 40 C.F.R. Parts 260-272 (1989).

[3] *See Environmental Defense Fund v. United States Environmental Protection Agency*, 852 F.2d 1309, 1310 (D.C. Cir. 1988) ("*EDF v. EPA I*").

wastes or hazardous constituents.[4] The section 3004(u) corrective action requirement is by far the most economically burdensome provision of Subtitle C. EPA estimates annual corrective action compliance costs in the billions.

2. The Bevill Amendment and Section 3004(x)

Congress recognized early that the Subtitle C program, which had been enacted "to address the hazards of industrial and manufacturing wastes,"[5] might not be appropriate for wastes generated by the mining, utility, and cement kiln industries. Wastes from these industries are generated in volumes that are orders of magnitude greater than those generated by all Subtitle C hazardous waste facilities combined, and do not pose the same degree of environmental risk as wastes from typical industrial and manufacturing operations.[6] For example, mining industry waste management facilities generally are located distant from population centers and drinking water sources, and pose reduced threats to groundwater because they are located in drier climates.[7] Accordingly, to relieve those three industries "of the onerous economic burden of stringent Subtitle C controls if at all possible,"[8] Congress adopted the Bevill Amendment to RCRA in 1980.[9]

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[4] 42 U.S.C. § 6924(u).

[5] *EDF v. EPA I*, 852 F.2d at 1310.

[6] *See, e.g.*, 51 Fed. Reg. 24,496, 24,499 (1986); App. at 48a.

[7] *Id.* at 24,499-500; App. at 50a-53a.

[8] *EDF v. EPA I*, 852 F.2d at 1315.

[9] A related amendment known as the "Bentsen Amendment" was designed to provide similar relief for the oil and gas industry. 42 U.S.C. §§ 6921(b)(2) and 6982(m).

The Bevill Amendment was designed "to break with the previous [Subtitle C] approach to regulation of hazardous industrial wastes" by focusing on the "actual dangers," if any, posed by wastes from the mining, utility, and cement kiln industries, and on the "cost[s] and the economic impact" on these industries of subjecting such wastes to Subtitle C controls.[10] The Bevill Amendment did three things. It proscribed the imposition of any Subtitle C controls on solid waste from the specified industries.[11] It further directed EPA to conduct a detailed and comprehensive study of the wastes from those industries: a study that addresses specified factors, such as whether disposal of the wastes has any adverse effects on human health or the environment, whether Subtitle C controls would have an adverse impact on the nation's use of natural resources, and the cost of various regulatory alternatives.[12] Finally, the Bevill Amendment directed EPA, after completing the required study and reporting the results to Congress, to decide, by means of a Regulatory Determination, whether Subtitle C regulation of Bevill wastes was warranted.[13]

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[10] *EDF v. EPA I*, 852 F.2d at 1314-15.

[11] 42 U.S.C. § 6921(b)(3)(A).

[12] 42 U.S.C. §§ 6982(n), (o), and (p). Congress had previously directed EPA to conduct a similar study for mining industry wastes which had not been completed by 1980. 42 U.S.C. § 6982(f); *EDF v. EPA I*, 852 F.2d at 1310.

[13] 42 U.S.C. § 6921(b)(3)(C). This Regulatory Determination was to made after public hearing and comment, and not later than six months after EPA submitted the study of the respective wastes to Congress. *Id.* The Regulatory Determination was to be based on the same factors evaluated in the study and Report to Congress. *EDF v. EPA I*, 852 F.2d at 1310-11.

When enacting HSWA in 1984, Congress recognized the severe impact its new RCRA Subtitle C statutory requirements, including those in section 3004(u), could have on the industries covered by the Bevill Amendment. Accordingly, Congress enacted section 3004(x). If EPA makes a Regulatory Determination that Subtitle C regulation of wastes covered by the Bevill Amendment is warranted, section 3004(x) authorizes EPA to modify certain Subtitle C requirements, including section 3004(u), to take into account the "special characteristics" of those wastes, "the practical difficulties associated with implementation of such requirements," as well as other factors.[14]

C. Regulatory Determinations

EPA initially implemented the Bevill Amendment as envisioned by Congress. For example, after complying with the requirements of the Bevill Amendment, EPA in 1986 determined that two classes of mining wastes—extraction and beneficiation wastes—should not be subject to Subtitle C regulation.[15] EPA reasoned that the vast quantities of mining extraction and beneficiation wastes generated annually, and the unique characteristics of those wastes, made Subtitle C regulation technically infeasible, economically impractical, and environmentally unnecessary.[16] The Agency found, for example, that "[t]he mining industry alone generates over one billion metric tons of [extraction and beneficiation] waste per year compared to 260 million metric tons generated annually

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[14] 42 U.S.C. § 6924(x).

[15] 51 Fed. Reg. at 24,496; App. at 48a.

[16] *Id.* at 24,500; App. at 53a-55a.

by all other hazardous waste industries."[17] EPA's Regulatory Determination for mining industry extraction and beneficiation wastes has been upheld by the Court of Appeals.[18] EPA is to complete the Bevill Amendment process for the one remaining class of Bevill mining wastes—processing wastes—by January 31, 1991.[19]

D. The Rulemaking At Issue

In 1987, EPA issued a final rule interpreting the 1984 amendments to RCRA, including section 3004(u). In that rule, EPA summarily announced that " 'Bevill wastes'. . . are [currently] subject to the corrective action requirements of Section 3004(u) [of Subtitle C] when they are found in solid waste management units at facilities that need permits to manage hazardous wastes."[20] Although section 3004(u) is located in Subtitle C of RCRA, the Agency reached this conclusion without first complying with the special procedural and substantive requirements prescribed by Congress in the Bevill Amendment. Moreover, EPA completely ignored its prior 1986 Regulatory Determination, which had been made in accordance with the Bevill Amendment, that extraction and beneficiation wastes

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[17] *Id.* at 24,499; App. at 51a.

[18] *EDF v. EPA I*, 852 F.2d at 1313-16.

[19] *Environmental Defense Fund v. United States Environmental Protection Agency*, 852 F.2d 1316, 1331 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989) (*"EDF v. EPA II"*), *schedule modified by* Order entered March 14, 1989 in No. 86-1584 and consolidated cases (D.C. Cir.). *See also* 53 Fed. Reg. 35,412 (1988); 54 Fed. Reg. 15,316 (1989); 54 Fed. Reg. 36,592 (1989); 55 Fed. Reg. 2322 (1990).

[20] 52 Fed. Reg. 45,788, 45,790 (1987); App. at 58a.

from the mining industry should not be subject to Subtitle C regulation, including its corrective action requirements. As a result, mining industry extraction, beneficiation, and processing wastes are now subject to section 3004(u) corrective action requirements.

E. The Decision Below

The American Mining Congress and Solite Corporation petitioned the Court of Appeals to review EPA's summary decision to subject Bevill wastes to regulation under section 3004(u) of Subtitle C without complying with the Bevill Amendment.[21] On September 22, 1989, the Court of Appeals denied the petition for review.[22]

The Court of Appeals acknowledged that "the linguistic case for exemption [of Bevill wastes] from corrective action [under section 3004(u)] is quite powerful" because the Bevill Amendment exempts such wastes from regulation under Subtitle C and section 3004(u) is "indisputably located within Subtitle C."[23] Nevertheless, the Court of Appeals concluded that the Bevill Amendment does not apply to section 3004(u). According to the Court of Appeals, the Bevill Amendment gives mining wastes "an exemption only from regulation as hazardous waste,"[24] and does not affect section 3004(u) because that section requires corrective action for "solid waste" management units.

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[21] A petition for review was also filed by the Edison Electric Institute, *et al.*

[22] *AISI v. EPA*, 886 F.2d at 404; App at 25a-26a.

[23] *Id.* at 395; App. at 6a.

[24] *Id.* at 396; App. at 8a.

REASONS FOR GRANTING THE WRIT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE IMPORTANT SECTORS OF UNITED STATES INDUSTRY HAVE BEEN DENIED THE SPECIAL PROCEDURAL AND SUBSTANTIVE PROTECTIONS MANDATED BY CONGRESS

This case raises important issues of statutory construction associated with the administration of RCRA, and involves the denial of significant rights created by RCRA.[25] In the rulemaking at issue in this case, EPA summarily imposed corrective action requirements under section 3004(u) of Subtitle C of RCRA on the three important United States industries singled out by Congress for special review under the Bevill Amendment, without even pretending to comply with its responsibilities under that Amendment. Because of EPA's failure to comply with its Bevill Amendment statutory obligations, these three industries will now be forced to comply with the most

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[25] This Court has recently granted certiorari in other federal environmental cases involving fundamental questions of statutory and regulatory interpretation. *See, e.g., Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2276 (1988) (certiorari granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, 481 U.S. 412, 417 (1987) (certiorari granted to determine whether a jury trial is required to determine liability and assess penalties for violation of section 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (certiorari granted to review validity of U.S. Army Corps of Engineers' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (certiorari granted to review validity of EPA's "bubble" concept under the Clean Air Act).

costly and burdensome aspect of the RCRA Subtitle C regulatory program, without EPA ever having made the Regulatory Determination mandated by Congress that such burdens are warranted.[26]

A. The Decision Below Violates The Clear Admonition Of This Court That Reviewing Courts Must Give Effect To The Plain Language Of Statutory Provisions

This Court has held that, in deciding whether agency action is contrary to law, a reviewing court must first consider whether Congress "has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("*Chevron*"). "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

The Court of Appeals' review in this case started, and under *Chevron* should have ended, with an analysis of the plain language of RCRA. The Court of Appeals in its opinion conceded that "the linguistic case for exemption [of Bevill wastes] from corrective action [under section 3004(u)] is quite powerful."[27] In particular, the Court of Appeals acknowledged that

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[26] Under the Bevill Amendment, Subtitle C requirements, including those under section 3004(u), can be imposed on Bevill wastes, but only after the special review requirements of that Amendment are met. Bevill wastes remain subject to all other applicable federal and state regulatory requirements. What petitioners seek here is EPA's compliance with its obligations under the Bevill Amendment by not imposing Subtitle C corrective action requirements on Bevill wastes until the Agency determines whether those requirements and the costs associated with them are warranted.

[27] *AISI v. EPA*, 886 F.2d at 395; App. at 6a.

the Bevill Amendment exempts Bevill wastes from regulation under Subtitle C, and that section 3004(u) is "indisputably located within Subtitle C."[28]

Nevertheless, the Court of Appeals ignored the admonitions of *Chevron*, and ruled that EPA had not erred by failing to comply with the special review mandated under the Bevill Amendment before the Agency imposed Subtitle C section 3004(u) requirements on Bevill wastes. According to the Court of Appeals, the Bevill Amendment grants Bevill wastes "an exemption only from [Subtitle C] regulation as hazardous wastes."[29] The Court of Appeals thus ruled that EPA did not have to comply with the special review requirements of the Bevill Amendment because section 3004(u) requires corrective action not only for hazardous, but also for non-hazardous, solid wastes.

The Court of Appeals' decision is wrong, because the Bevill Amendment is devoid of language restricting its scope to only some Subtitle C regulations. The Bevill Amendment covers all regulations in Subtitle C, and section 3004(u) is "indisputedly located within Subtitle C."[30] Section 3001(b)(3)(A) of the Bevill Amendment directs that Bevill wastes shall "be subject only to regulation under other applicable provisions of Federal or State law in lieu of *this subchapter* [*i.e.*, Subtitle C]" until completion of the Congressionally mandated study and regulatory determina-

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[28] *Id.*

[29] *Id.* at 396; App. at 8a.

[30] *Id.* at 395; App. at 6a.

tion.[31] Similarly, section 3001(b)(3)(C) mandates that EPA shall, "after public hearings and opportunity for comment, either determine to promulgate regulations under *this subchapter* [Subtitle C] for each [Bevill] waste . . . or determine that such [Subtitle C] regulations are unwarranted."[32] If Congress had intended to limit the scope of the Bevill Amendment, as the Court of Appeals suggests, it would have done so explicitly.

The statutory language of the Bevill Amendment is clear: before EPA may impose any of the requirements of Subtitle C, which includes the section 3004(u) corrective action rules, on Bevill wastes, the Agency must comply with the special review requirements established by the Bevill Amendment. The Court of Appeals was concerned that petitioners' view of the relationship between the Bevill Amendment and section 3004(u) would "elevate" Bevill wastes "to a privileged position above all other nonhazardous solid wastes."[33] The explicit goal of the Bevill Amendment is to place Bevill wastes in a special position *vis-a-vis* other solid wastes, *i.e.*, the Amendment plainly states that the solid wastes it covers shall not be regulated under Subtitle C unless such regulation is found to be warranted, after specified factors have been considered in a special study.[34]

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[31] 42 U.S.C. § 6921(b)(3)(A) (emphasis added).

[32] 42 U.S.C. § 6921(b)(3)(C) (emphasis added).

[33] *AISI v. EPA*, 886 F.2d at 395-96; App. at 8a.

[34] The Court of Appeals also stated that the Bevill process would be "logically irrelevant" to the decision on imposition of corrective action requirements. *AISI v. EPA*, 886 F.2d at 395; App. at 7a. The appellate court is wrong. An analysis of the

The *Chevron* decision applies with particular force in cases involving RCRA, which as the Court of Appeals has observed, is a statute characterized by "definitional specificity of the first order."[35] A court may not, under the guise of statutory interpretation, usurp Congress' legislative powers and insert words or phrases into statutory language that alter the statute's meaning.[36] Here, the Court of Appeals has legislated in just such a manner, and in so doing has deprived petitioners of their right to a formal Regulatory Determination whether the most onerous of Subtitle C requirements are warranted for their wastes.

B. Section 3004(x) Of The 1984 RCRA Amendments Confirms That The Court Of Appeals Has Violated The Plain Language Of The Bevill Amendment

Section 3004(x) of RCRA, which was enacted in 1984 along with section 3004(u), confirms that the Bevill Amendment extends to Subtitle C in its entirety. It also demonstrates that the Court of Appeals' decision makes no sense.

Section 3004(x) provides that "[i]f [a Bevill waste] is subject to regulation under this subchapter" (*i.e.*, Subtitle C), EPA may then modify certain Subtitle C requirements, including section 3004(u), to take into account the "special characteristics" of those wastes, the "practical difficulties associated with implemen-

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enormous costs of corrective action for the large volumes of Bevill wastes goes to the very heart of the Bevill Amendment.

[35] *American Mining Congress v. United States Environmental Protection Agency*, 824 F.2d 1177, 1189 (D.C. Cir. 1987).

[36] *United States v. Temple*, 105 U.S. 97, 98 (1881).

tation of such requirements," as well as other factors.[37]

If the Court of Appeals is correct that the Bevill Amendment does not encompass section 3004(u), there would have been no reason for the conditional language at the beginning of section 3004(x), because section 3004(u) would have applied automatically to Bevill wastes. Congress included the introductory clause of section 3004(x), which delays the trigger date of section 3004(x) until some future time, because it recognized that a Bevill study and Regulatory Determination still needed to be completed before these wastes could be subject to any of the new HSWA requirements mentioned in section 3004(x), including section 3004(u).

The Court of Appeals recognized the difficulty of reconciling its interpretation of the Bevill Amendment with the plain language in section 3004(x). Therefore, in an effort to "make[ ] sense"[38] of section 3004(x), the Court of Appeals put forth, *sua sponte*, a novel and erroneous interpretation of section 3004(x) that fails to give effect to the plain language of that provision. Specifically, the Court of Appeals stated that "to the extent that EPA imposes *special* § 3004(u) controls on hazardous wastes and classifies Bevill wastes as such, § 3004(x) allows the Agency to adjust the regulations to the special features of Bevill

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[37] 42 U.S.C. § 6924(x). As the Court of Appeals recently noted, Congress made section 3004(x) relief available only "*in the event that* the Agency chose to regulate [Bevill wastes] under Subtitle C." *EDF v. EPA I*, 852 F.2d at 1315 (emphasis in original).

[38] *AISI v. EPA*, 886 F.2d at 396; App. at 8a.

wastes."[39] Section 3004(x), however, does not limit EPA's modification authority to any "special" section 3004(u) controls that might be imposed on Bevill wastes. Instead, section 3004(x) authorizes EPA to modify the requirements of section 3004(u)—without limitation—if Bevill wastes become subject to regulation under Subtitle C. Once again, the Court of Appeals failed to give effect to the plain language of the statute.[40]

The plain language of the Bevill Amendment and section 3004(x) requires that before Bevill wastes can be regulated under any provision of Subtitle C, those wastes must be studied, and EPA must make a Regulatory Determination whether such controls, and the costs associated with them, are warranted. In the event that EPA then chooses to regulate Bevill wastes

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[39] *Id.* (emphasis in original). EPA did not advance or embrace this interpretation in the proceeding below; and the Agency has not adopted it since the Court of Appeals' decision.

[40] Moreover, the Court of Appeals failed to proffer any support for its hypothesis that Congress intended that EPA develop two separate tiers of corrective action requirements under section 3004(u). This is not surprising, because nothing in the statute or its legislative history suggests that Congress envisioned separate tiers of section 3004(u) corrective action requirements for hazardous and non-hazardous solid wastes.

EPA apparently believes that there is no basis for establishing different levels of section 3004(u) corrective action requirements. The Agency has stated that "[f]rom a legal standpoint, neither the language of § 3004(u) nor the legislative history to the statute indicate that non-hazardous wastes should be handled in a different manner than hazardous wastes." Options Paper: *Development of a Regulatory Program for Corrective Action Under Section 3004(u)*, attached to Memorandum from J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response (Jan. 8, 1987); App. at 65a.

under Subtitle C, the Agency may modify certain Subtitle C requirements pursuant to section 3004(x). Unfortunately, the Court of Appeals ignored the plain language of the statute and decided that EPA need not comply with the clear Bevill Amendment requirements set forth by Congress. This Court should grant this Petition to ensure that the Agency complies with those requirements so that the mining, utility, and cement kiln industries will not be subject to the enormous costs of section 3004(u) of Subtitle C unless EPA determines that doing so is warranted.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW EVISCERATES THE SPECIAL REGULATORY APPROACH THAT CONGRESS ESTABLISHED AS AN ESSENTIAL SAFEGUARD AGAINST UNNECESSARY OR INAPPROPRIATE REGULATION OF IMPORTANT INDUSTRIES

A. The Court Of Appeals' Decision Exposes Bevill Industries To Devastating Economic Burdens Without The Congressionally Required Regulatory Determination That Those Burdens Are Warranted

Congress' goal in enacting the Bevill Amendment was "to relieve the mining [utility, and cement kiln] industries of the onerous economic burden of stringent Subtitle C controls if at all possible."[41] The legislative history is replete with testimonials regarding the importance to the United States economy of the industries covered by the Bevill Amendment and expressions of concern over "the potential for disruptive economic impacts" if the wastes from those industries are subject to regulation under Subtitle C.[42]

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[41] *EDF v. EPA I*, 852 F.2d at 1315.

[42] 52 Fed. Reg. at 45,790, App. at 60a; 125 Cong. Rec. 13,244-

Accordingly, the Bevill Amendment was carefully crafted so that EPA could not impose any Subtitle C requirements on Bevill wastes without studying the wastes, reporting the results to Congress, holding public hearings, evaluating public comments, and making a formal Regulatory Determination that such regulation is warranted. Throughout this special process, EPA was directed to consider a variety of factors, including economics, which ordinarily play no role in EPA's Subtitle C regulatory program.[43]

The decision below, however, circumvents the Congressionally mandated Bevill process and automatically subjects Bevill wastes to section 3004(u) corrective action requirements, the single most costly component of the Subtitle C regulatory program. Those requirements will have a much greater economic impact on the mining, utility, and cement kiln industries than all other Subtitle C requirements combined. EPA has estimated that the Subtitle C corrective action requirements could cost as much as $1.8 *billion* annually at industrial and manufacturing waste sites, compared to $300 million annually for a total of 11 other key HSWA regulatory requirements under Subtitle C.[44] EPA acknowledges that the cost of complying with Subtitle C corrective action is potentially "very high." For example, in the utility industry, EPA estimates that the cost of compliance can, under some circumstances, reach $2 billion per power plant.[45] Un-

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45 (1979) (remarks of Sen. Huddleston), App. at 39a; 126 Cong. Rec. 3361-65 (1980) (remarks of Reps. Bevill, Findley, Rahall, Williams, and Staggers), App. at 41a.

[43] *See EDF v. EPA I*, 852 F.2d at 1315.

[44] 50 Fed. Reg. 28,702, 28,742 (1985); App. at 47a.

[45] *See* EPA Report to Congress: *Wastes from the Combustion*

der the Court of Appeals' ruling, these devastating economic burdens will be imposed on the mining, utility, and cement kiln industries without a prior determination that they are warranted, as required by the Bevill Amendment.[46]

B. The Court Of Appeals' Decision Eviscerates EPA's Regulatory Determination That Mining Industry Extraction And Beneficiation Wastes Should Not Be Subject To Corrective Action Requirements Under Subtitle C Of RCRA

The decision of the Court of Appeals has an especially perverse effect on extraction and beneficiation wastes from the mining industry. On July 3, 1986, after completing the Bevill Amendment process, EPA determined that extraction and beneficiation wastes, which total between 1.3 and 2 billion metric

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of Coal by Electric Utility Power Plants, 6-19 to 6-20, 6-44 (1988), Exec. Commun. No. 3113, 134 Cong. Rec. H827 (daily ed. Mar. 10, 1988); App. at 62a.

[46] The Court of Appeals asserted that "[s]ection 3004(u) . . . in no way implicates the concern that gave rise to [the Bevill Amendment]: the disruption that would follow if the wastes were improvidently classified as hazardous." *AISI v. EPA*, 886 F.2d at 395; App. at 6a. That assertion makes no sense. It would be inconsistent for Congress to have been concerned about the disruptive effects of "improvidently" classifying Bevill wastes as hazardous wastes and also be insensitive to the disruption that would follow if Bevill wastes were regulated under section 3004(u). Because the potential costs of compliance with section 3004(u) for Bevill wastes dwarf the costs of compliance with all other Subtitle C requirements, the Court's holding that section 3004(u) requirements can apply immediately to Bevill wastes essentially repeals the Bevill Amendment by implication. Any such implied repeal of previously enacted statutory provisions is strongly disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549-50 (1974); 1A Sutherland, *Statutory Construction* § 23.09, at 331 (4th ed. 1985).

tons each year,[47] should not be subject to Subtitle C regulation, including corrective action requirements under section 3004(u).[48] EPA intends instead to develop a separate, tailored regulatory program for extraction and beneficiation wastes under Subtitle D of RCRA.[49] EPA, in fact, has already begun developing a regulatory program under Subtitle D for extraction and beneficiation wastes, which includes corrective action requirements that are more flexible than under Subtitle C.[50] The Subtitle D program is currently scheduled to be formally proposed in April 1991.[51]

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[47] 51 Fed. Reg. at 24,497; App. at 49a. EPA estimates the accumulated volume of extraction and beneficiation wastes to be approximately 50 billion metric tons. *Id.* Some individual mining operations generate more wastes than other entire industries. *Id.* at 24,498; App. at 49a.

[48] 51 Fed. Reg. at 24,496; App. at 48a. EPA's Regulatory Determination for extraction and beneficiation wastes explicitly addressed the issue of corrective action under section 3004(u). For example, the Agency determined that, if extraction and beneficiation wastes were subjected to Subtitle C regulation, approximately 60 percent of the costs of such regulation could be attributed to "waste[s] accumulated from past production," *id.* at 24,498, App. at 50a, which are beyond the reach of any Subtitle C requirements other than section 3004(u) corrective action. EPA also considered but decided against modifying the section 3004(u) corrective action requirements for "continuing releases at permitted facilities." *Id.* at 24,500; App. at 54a-55a.

[49] 51 Fed. Reg. at 24,501; App. at 56a.

[50] *See e.g.*, U.S. EPA, Outline of RCRA Subtitle D Mining Waste Strawman (May 31, 1988 draft), attached to Letter from Jeffrey D. Denit, Deputy Director, Office of Solid Waste, to Roderick T. Dwyer, Senior Counsel, American Mining Congress (June 1, 1988); App. at 66a.

[51] 54 Fed. Reg. 45,272, 45,313-14 (1989).

The decision of the Court of Appeals, however, eviscerates EPA's 1986 Regulatory Determination and subjects extraction and beneficiation wastes to the most costly component of the Subtitle C program even though EPA has already decided that Subtitle C controls and costs are not warranted for those wastes. In this way, the Court of Appeals once again violated the plain language and purpose of the Bevill Amendment.

CONCLUSION

Because the decision of the Court of Appeals violates the plain language of RCRA and eviscerates the special regulatory approach that Congress viewed as an essential safeguard against unwarranted regulation of the mining, utility, and cement kiln industries, this Petition for Certiorari should be granted.

Of Counsel:

EDWARD M. GREEN, ESQ.
Chief Counsel
RODERICK T. DWYER, ESQ.
Senior Counsel
AMERICAN MINING CONGRESS
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 861-2800

Respectfully submitted,

JOHN N. HANSON, ESQ.
Counsel of Record
DONALD J. PATTERSON, JR., ESQ.
AARON H. GOLDBERG, ESQ.
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Petitioner
American Mining Congress

JEREMIAH J. JEWETT, III, ESQ.
MCGUIRE, WOODS, BATTLE
& BOOTHE
One James Center
Richmond, Virginia 23219
(804) 774-1005

Attorney for Petitioner
Solite Corporation

March 27, 1990

APPENDIX

INDEX TO APPENDICES

Page

APPENDIX A: THE CASE BELOW

1. *American Iron and Steel Institute v. United States Environmental Protection Agency*, 886 F.2d 390 (D.C. Cir. 1989) 1a
2. Order Denying Rehearing 27a
3. Order Denying Rehearing *En Banc* 28a

APPENDIX B: THE RESOURCE CONSERVATION AND RECOVERY ACT

1. Section 3001(a), (b); 42 U.S.C. § 6921(a), (b) . 30a
2. Section 3004(u), (x); 42 U.S.C. § 6924(u), (x) . 32a
3. Section 8002(f), (n), (o), (p); 42 U.S.C. § 6982(f), (n), (o), (p) 33a

APPENDIX C: LEGISLATIVE HISTORY

1. 125 Cong. Rec. 13,244 (1979) 39a
2. 126 Cong. Rec. 3361 (1980) 41a

APPENDIX D: FEDERAL REGISTER NOTICES

1. 50 Fed. Reg. 28,702 (1985) 46a
2. 51 Fed. Reg. 24,496 (1986) 48a
3. 52 Fed. Reg. 45,788 (1987) 58a

APPENDIX E: MISCELLANEOUS

1. EPA Report To Congress: *Wastes From The Combustion Of Coal By Electric Utility Power Plants* (February 1988) 61a
2. Options Paper: *Development Of A Regulatory Program For Corrective Action Under § 3004(u)* 63a
3. U.S. EPA, Outline Of RCRA Subtitle D Mining Waste Strawman (May 31, 1988 Draft) 66a

**UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.**

Nos. 88-1155, 88-1156, 88-1158, 88-1165, 88-1168 and 88-1169.

AMERICAN IRON AND STEEL INSTITUTE,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

American Petroleum Institute, Edison Electric Institute, et al.,
Intervenors.

Argued May 16, 1989.
Decided Sept. 22, 1989.

Before MIKVA and WILLIAMS, Circuit Judges, and WILL,* District Judge for the Northern District of Illinois.

Opinion for the court filed by Circuit Judge WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

The Resource Conservation and Recovery Act ("RCRA"), Pub.L. No. 94-580, 90 Stat. 2795 (1976), created in its Subtitle C a system for control over the treatment, storage and disposal of hazardous wastes. RCRA §§ 3001-13, 42 U.S.C. §§ 6921-34 (1982) (current version at 42 U.S.C. §§ 6921-39a (1982 & Supp. IV 1986); see also RCRA § 1004(5), 42 U.S.C. § 6903(5) (1982) (defining "hazardous

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

waste"). While invariably described as a "cradle-to-grave" system, it in fact reaches (as we shall see) well beyond the grave. It required owners and operators of hazardous waste treatment, storage and disposal facilities, here generally referred to simply as facilities or treatment facilities, to secure operating permits from the Environmental Protection Agency, RCRA §§ 3004-05; 42 U.S.C. §§ 6924-25 (1982), or from a state holding EPA authorization to issue permits, RCRA § 3006(b), 42 U.S.C. § 6926(b) (1982). In addition, RCRA Subtitle D established a regulatory program for nonhazardous solid wastes, with primary enforcement by the states. RCRA § 4001-09; 42 U.S.C. §§ 6941-49 (current version at RCRA §§ 4001-10, 42 U.S.C. § 6941-49a (1982 & Supp. IV 1986)[1]). See generally *United Technologies Corp. v. EPA*, 821 F.2d 714 (D.C.Cir.1987); *Environmental Defense Fund v. EPA*, 852 F.2d 1309, 1310-11 (D.C.Cir.1988).

As originally enacted, RCRA "did not require permittees to take significant remedial action to correct past mismanagement of hazardous waste." *United Technologies*, 821 F.2d at 717. In 1984 Congress decisively changed that focus with the Hazardous and Solid Waste Amendments ("HSWA"), Pub.L. No. 98-616, 98 Stat. 3224 (1984). This greatly increased EPA's authority to require corrective action, even for releases that occurred before the HSWA was enacted.

In 1985 EPA adopted a somewhat skeletal set of regulations, implementing the HSWA in terms that largely tracked the statutory language. *First Codification Rule*, 50 Fed.Reg. 28,702 (July 15, 1985). Under attack here is its 1987 *Final Second Codification Rule*, 52 Fed.Red. 45,788 (Dec. 1, 1987), which adds critical detail to the earlier work, and, in the judgment of petitioners and in-

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[1] RCRA has been heavily amended since 1980. Henceforth we omit citations to later amendments when the context makes it clear that we are discussing the original statute.

tervenors, goes well beyond EPA's statutory authority. Our jurisdiction to review the EPA's regulations flows from RCRA § 7006(a), 42 U.S.C. § 6976(a) (1982). We will not try to summarize our holding here, as it is almost impossible to state the issues intelligibly without more detail than a summary could reasonably bear.

I. Bevill-Bentsen Wastes

Many petitioners attack the regulations for their inclusion of so-called Bevill-Bentsen wastes among those subject to corrective action. We reject the claim. We read the Bevill-Bentsen provisions as intended merely to protect such wastes from undue burdens that might flow from their being overhastily classified as hazardous wastes; petitioners' reading of the statute would immunize them from burdens concededly imposed by Congress on *non*-hazardous wastes.

Congress in October 1980 adopted the Bevill and Bentsen amendments as part of the Solid Waste Disposal Act Amendments of 1980, Pub.L. No. 96-482, 94 Stat. 2334 (1980). The Bevill amendment, RCRA § 3001(b)(3), 42 U.S.C. § 6921(b)(3) (1982), exempted particular mining industry wastes—now known as Bevill wastes—from the hazardous waste controls in RCRA Subtitle C, pending further study by EPA as to their environmental and health effects and a possible determination by EPA as to whether to apply Subtitle C or not. The exemption takes the form of providing that

> Notwithstanding [provisions authorizing the EPA to identify hazardous wastes to be subject to subtitle C regulation], each [Bevill] waste listed below shall . . . be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter. . . .

42 U.S.C. § 6921(b)(3)(A). The Bentsen amendment, RCRA §§ 3001(b)(2)(A), (C), 8002(m), 42 U.S.C. §§ 6921(b)(2)(A),

(C), 6982(m) (1982), gave a similar exemption to oil, gas and geothermal production wastes—Bentsen wastes—except that if EPA determined that Subtitle C regulations were warranted, it was only to transmit them to Congress for possible adoption. RCRA § 3001(b)(2)(C), 42 U.S.C. § 6921(b)(2)(C) (1982). See generally *Environmental Defense Fund v. EPA*, 852 F.2d at 1314-15; *Environmental Defense Fund v. EPA*, 852 F.2d 1316, 1318-20 (D.C. Cir.1988).

When the EPA conducted the regulatory determinations required by the two amendments, it decided (with an exception) that both types of wastes should be regulated only as Subtitle D nonhazardous solid wastes. See 53 Fed.Reg. 25,446 (July 6, 1988) (Bentsen waste determination); *cf. Alaska Center for the Environment v. Reilly*, No. 88-1715, Order (D.C.Cir. Apr. 27, 1989) (dismissing challenge to Bentsen determination) *pet. for reh'g filed* June 12, 1989; *Environmental Defense Fund v. EPA*, 852 F.2d 1309 (D.C.Cir.1988) (upholding EPA decision regarding extraction and beneficiation mining wastes); *Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C.Cir.1988) (ordering EPA to come to decision on mining processing wastes); *American Mining Congress v. EPA*, No. 88-1835, et al. (D.C.Cir. filed Nov. 29, 1988) (challenge to later EPA decision to list certain processing wastes as hazardous wastes).

The issue is whether these wastes are reached by § 3004(u) of RCRA, the source of EPA's authority to require corrective action:

> Standards promulgated under this section [RCRA § 3004, 42 U.S.C. § 6924] shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of *hazardous waste or constituents* from *any* solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this sub-

> chapter, regardless of the time at which waste was placed in such unit. . . .

RCRA § 3004(u), 42 U.S.C. § 6924(u) (Supp. IV 1986) (emphasis added).

The *Final Second Codification Rule* allows the agency to require sampling and study to determine the risk of release of hazardous wastes or constituents, see 52 Fed.Reg. 45,788, 45,799, codified at 40 CFR § 270.14(d), and to require appropriate corrective action, see *id.* at § 264.101. As § 3004(u) states, any solid waste management unit ("SWMU") at a facility seeking a permit is susceptible to these requirements, and the preamble to the *Final Second Codification Rule* specifies that such units are not exempt merely because Bevill-Bentsen wastes are the only possible source of hazardous constituents. The preamble states explicitly that EPA intends to exercise its § 3004(u) authority "on a case-by-case basis, writing permit conditions to require monitoring (or modeling) for any media [sic] where it finds that a SWMU is likely to release hazardous constituents that pose a threat to human health and the environment." 52 Fed.Reg. at 45,789/2. In confirming that this coverage encompasses Bevill-Bentsen wastes, the EPA stressed that § 3004(u) called for cleanup not only of hazardous "wastes" but also of hazardous "constituents." *Id.* at 45,790/1. It noted that the commenter asserting exemption of Bevill-Bentsen wastes had conceded that the section covered nonhazardous solid wastes, *id.;* counsel confirmed the concession at oral argument. Thus the issue boils down to whether the exempting language is powerful enough to afford Bevill-Bentsen wastes a uniquely privileged position, free from corrective action requirements imposed on all other nonhazardous solid wastes generally regulated exclusively under Subtitle D.

It is quite true that the Bevill-Bentsen amendments allow regulation of the affected wastes only "in lieu of"

Subtitle C. See RCRA § 3001(b)(3)(A), 42 U.S.C. § 6921(b)(3)(A) (1982) (Bevill); RCRA § 3001(b)(2)(A), 42 U.S.C. § 6921(b)(2)(A) (1982) (Bentsen). As § 3004(u) is the sole basis for EPA's corrective action requirement, and is indisputably located within Subtitle C, the linguistic case for exemption from corrective action is quite powerful.

We must at the outset reject one device by which the EPA proposes to defeat this claim. It suggests that because the HSWA added § 3000(u) only in 1984, that section logically falls outside the Bevill-Bentsen amendments' cross-references to Subtitle C. The argument seems palpably defective. If Congress exempts wastes from Subtitle C regulation, and then adds to Subtitle C, the normal understanding would be that the exemption covers the additions.

We note, however, that the language of § 3004(u), requiring "corrective action for all releases of hazardous waste or *constituents* from *any* solid waste management unit at a . . . facility seeking a permit," sweeps far more broadly than the rest of Subtitle C, with its focus on hazardous waste. Moreover, the House Report explaining § 3004(u) not only focuses entirely on release of hazardous constituents, see H.R. Rep. 98-198, 98th Cong., 2d Sess., Pt. I, at 60, *reprinted in* 1984 U.S. Code Cong. & Admin.News 5576, 5619, but explains that the section calls on the Administrator "to examine all units at the facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes," *id.* Section 3004(u)'s focus on possible release of hazardous constituents, regardless of the absence of hazardous waste, suggests to us that it in no way implicates the concern that gave rise to Bevill-Bentsen: the disruption that would follow if the wastes were improvidently classified as hazardous.

Both the structure of the regulatory scheme and the legislative history of the Bevill-Bentsen amendments indicate that it was regulation of those wastes *as* hazardous wastes that Congress sought to restrict. The amendments establish a special process by which the EPA is to ascertain, for sure, whether the wastes are truly hazardous. As all *non*hazardous wastes are subject to corrective action requirements under § 3004(u), the study seems logically irrelevant to their imposition on Bevill-Bentsen wastes.

Moreover, the EPA and the joint petitioners agree that the amendments arose out of the apparent imminence of the wastes' being regulated as subtitle C hazardous wastes in EPA's May 1980 *Phase I Interim Status Standards*, 45 Fed.Reg. 33,084. See Joint Brief of Petitioners and Intervenors at 26 n. 21; Brief for Respondent at 10; see also 45 Fed.Reg. at 33,089 (EPA statement that 40 CFR § 261.4(b) will temporarily exclude Bevill-Bentsen wastes pending congressional action). Naturally enough, the floor discussion of the amendments stressed concern over their regulation has hazardous wastes. Representative Bevill, for example, explained that he knew of no evidence that the wastes "ever presented a 'substantial-hazard to human health or the environment,' the statutory standard for regulation as a hazardous waste." 126 Cong.Rec. 3361 (1980). See also 125 Cong.Rec. 13,242/1 (1979) (remarks of Sen. Randolph); *id.* at 13,244/2 (remarks of Sen. Bentsen); *id.* at 33,849/2-3 (remarks of Rep. Frost). Although petitioners call our attention to occasions on which sponsors spoke of the amendments as generally deferring "regulation" of the wastes, see 126 Cong.Rec. 3361/1, 3362/1 (1980) (remarks of Rep. Bevill), these appear amid more precise articulations of the goal as seeking to defer their regulation as hazardous wastes.

Petitioners' proposed interpretation of the amendments and § 3004(u) would lead to bizarre results. Not only would it make the imposition of corrective action requirements depend upon the outcome of a logically irrelevant inquiry,

but it would elevate Bevill-Bentsen wastes to a privileged position above all other nonhazardous solid wastes. Yet petitioners neither suggest a reason for such an elevation, nor point to any given by the amendments' sponsors. We read the amendments as giving Bevill-Bentsen wastes an exemption only from regulation as hazardous waste.

Petitioners also point, at least as far as Bevill wastes are concerned, to RCRA § 3004(x):

> If [Bevill waste] . . . is subject to regulation under this subchapter [Subtitle C], the Administrator is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (*o*), and (u) of this section and section 6925(j) of this title, in the case of landfills or surface impoundments receiving such solid waste, to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site-specific characteristics, including but not limited to the climate, geology, hydrology and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment.

RCRA § 3004(x), 42 U.S.C. § 6924(x) (Supp. IV 1986). Petitioners argue that the inclusion of subsection (u) among the provisions as to which Bevill wastes should receive special consideration, if they should be subjected to Subtitle C regulation generally, must reflect an assumption they will be exempt from § 3004(u) unless EPA makes the affirmative decisions required under the amendment. But § 3004(x)also makes sense under our reading of § 3004(u): to the extent that EPA imposes *special* § 3004(u) controls on hazardous wastes and classifies Bevill wastes as such, § 3004(x) allows the agency to adjust the regulations to the special features of Bevill wastes.

Accordingly, we reject petitioners' claim that the Bevill-Bentsen amendments exempt those wastes from the cor-

rective action requirements that § 3004(u) authorizes for nonhazardous wastes.

II. Inclusion of Owner/Operators Seeking "Post-Closure" Permits or "Permits-by-Rule"

Section 3004(u), it will be recalled, authorized corrective action requirements for units at a "treatment, storage or disposal facility seeking a permit under [subchapter C]."[2] The next two claims contest the EPA's interpretation of what behavior constitutes "seeking a permit" giving rise to a duty to take corrective action.

First, petitioner American Iron and Steel Institute and intervenor American Petroleum Institute challenge the EPA's view, expressed in the *Final Second Codification Rule*, 52 Fed.Reg. at 45,794/2-95/1, that the corrective action requirement covers facilities seeking "post-closure" permits as well as those seeking operating permits.

Second, petitioner Inland Steel Company contests the EPA's decision that the corrective action requirement extends to owner/operators of underground injection wells who receive one type of what are called "permits-by-rule"—in this case, permits issued under the underground injection control ("UIC") program of the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-11 (1982 & Supp. IV 1986). The EPA deems such a permit to be a RCRA permit if the owner-operator has complied with RCRA regulatory requirements for wells injecting hazardous waste. See 52 Fed. Reg. at 45,791-92; see also 40 CFR § 270.60(b) (1988).

The EPA's three-part reply to both these challenges is (1) that they have already been adjudicated by this court in *United Technologies v. EPA*, 821 F.2d 714, 724-25

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[2] Thus units with Bevill-Bentsen wastes are subject to corrective action under part I of this decision only if they are at a facility that requires a subchapter C permit. See *First Codification Rule*, 50 Fed.Reg. at 28,712/2.

(D.C.Cir.1987), (2) that this court lacks jurisdiction because the claims are out of time, and (3) that petitioners are substantively mistaken. We find the first procedural objection correct as to the first claim (post-closure permits) and the second correct as to both. Accordingly we do not reach the merits.

Issue Preclusion

Petitioners acknowledge that in *United Technologies* the American Iron and Steel Institute and the American Petroleum Institute raised both these issues. Moreover, as the number of pages in their briefs testifies, the claims were scarcely an incidental part of their challenge to the *First Codification Rule.* See Joint Brief of Industry Petitioners and Intervenors at 37-44 and Joint Reply Brief of Industry Petitioners and Intervenors at 16-19, *United Technologies v. EPA,* 821 F.2d 714 (D.C. Cir.1987) (Nos. 85-1654 et al.). Inland Steel Company, however, was not a party to that suit. Thus, the doctrine of issue preclusion plainly cannot bar its claim here—the permit-by-rule contention.

Our opinion in *United Technologies* makes only two references that could relate to either issue, but the outcome of the decision makes clear the court rejected both contentions. One possible reference came at the start of the opinion, where we stated that

> [b]ased on our careful review of the Final Rule, and the arguments advanced by the parties, we conclude that the regulations promulgated by the EPA are, *for the most part,* reasonable and consistent with the 1984 Amendments. There is one aspect of the Final Rule, however, that is inconsistent with the plain meaning of the 1984 Amendments.

821 F.2d at 716 (italics in original). The "one aspect" concerned a matter unrelated to the two issues here. See 821 F.2d at 723-24.

The second, and unambiguous, reference to the permit issues came when we summarized our opinion as follows: "The various petitioners have raised a host of objections to the EPA's Final Rule. For the most part, we find these objections to be without merit." *Id.* at 725. While the comment was brief, the outcome of the case—denial of all relief except as to a clearly unrelated issue—necessarily constituted a rejection of the claims as to both post-closure permits and permits by rule. See Restatement (Second) of Judgments § 27 (1982) ("[w]hen an issue of . . . law is actually litigated and determined . . . and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties"). Even in the absence of *any* opinion a judgment bars relitigation of an issue necessary to the judgment, see *National Classification Committee v. United States*, 765 F.2d 164, 171 (D.C.Cir.1985), so it is plain that the adjudicator's silence on the issue is relevant only insofar as it may tend to obscure whether the issue was truly litigated. Thus the American Iron and Steel Institute and the American Petroleum Institute have had their day in court on both issues.

Subject Matter Jurisdiction

Our decision in *United Technologies* does not preclude Inland Steel's petition regarding permits by rule, however, as Inland was not a party to the earlier proceeding nor in privity with any party. But Inland, and indeed the other claimants here, encounter a further obstacle, RCRA § 7006(a)(1)'s requirement that petitions for review of the EPA's regulations be filed within 90 days. 42 U.S.C. § 6976(a)(1) (1982).

The EPA first set out its understanding of the corrective action authority in its *First Codification Rule*, 50 Fed.Reg. 28,702, 28,711/3-12/1 (post-closure permits), 28,715/2 (permits by rule) (July 15, 1985). Thus the time bar would normally be understood to have closed off any

challenge by October 1985. Petitioners, however, rely on *Ohio v. EPA*, 838 F.2d 1325, 1328-29 (D.C.Cir.1988), under which the time for seeking review starts fresh at repromulgation if an agency *reopens* the issue by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form. *Id.* at 1328; see also *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769, 772 (D.C.Cir.1988) (formal reconsideration by agency); *Association of American Railroads v. ICC*, 846 F.2d 1465, 1473 (D.C.Cir.1988) (agency announcement that it sought to harmonize inconsistent regulations).

Here the EPA mentioned its treatment of post-closure permits and permits by rule in the preamble of its *Proposed Second Codification Rule*, 51 Fed.Reg. at 10,715/3-16/1 (post-closure permits), 10,714/1-3 (UIC wells). But nowhere in these pages does the EPA reopen the question of *whether* permits by rule or post-closure permits should be treated as RCRA permits. Instead, the EPA asked for comments on the specific conditions that it proposed attaching to RCRA permits by rule, notably information-gathering that the agency sought to compel permittees to conduct, see *id.* at 10,741/3, and addressed refinements within the coverage of post-closure permits, see *id.* at 10,715/3-16/1. The EPA discussion lacked any sustained attempt to reiterate the reasons it had offered less than two years earlier. In the *Final Second Codification* Rule the EPA noted briefly that it had received comments suggesting that permits for § 3004(u); it responded by stating that it "reaffirm[ed]" its previous position and at most briefly reiterated its prior reasoning. See 52 Fed. Reg. at 45,792/3-93/1. As to post-closure permits, EPA's response focused on other issues. *See id.* at 45,794/2.

The "reopening" rule of *Ohio v. EPA* is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an

agency into a reply, and then sue on the grounds that the agency had re-opened the issue. To so read *Ohio v. EPA* would undermine congressional efforts to secure prompt and final review of agency decisions. We conclude therefore that we are without jurisdiction to hear either claim.

III. The Nature of "Closure"

From 1983 until adoption of the *Final Second Codification Rule*, the EPA's formal statement of the scope of the RCRA permit requirement read as follows:

> *Scope of the RCRA Permit Requirement.* RCRA requires a permit for the "treatment," "storage," or "disposal" of any "hazardous waste" as identified or listed in 40 CFR Part 261. . . . Owners and operators of hazardous waste management units must have permits *during the active life (including the closure period)* of the unit, and for any unit which *closes* after January 26, 1983, during any post-closure care period required under § 264.117 [regulations for post-closure care and use of property, including 30 years of monitoring] and during any compliance period specified under § 264.96 ["the number of years equal to the active life of the waste management area (including any waste management activity prior to permitting, and the closure period.)"], including any extension of the compliance period under § 264.96(c).

40 CFR § 270.1(c) (1986) (emphasis added), 48 Fed.Reg. 14,228, 14,229 (Apr. 1, 1983), *amended*, 48 Fed.Reg. 30,113, 30,113 (June 30, 1983). Though the rule makes closure pivotal, it plainly does not define the term nor reveal when an owner/operator can be said to have accomplished it.

In the *Final Second Codification Rule* the EPA replaced the above with language carrying a broader reach:

> *Scope of the RCRA Permit Requirement.* RCRA requires a permit for the "treatment," "storage," and "disposal" of any "hazardous waste" as identified or listed in 40 CFR Part 261. . . . Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or [1] *that certified closure (according to § 265.115) after January 26, 1983*, must have post-closure permits, [2] *unless they demonstrate closure by removal as provided under § 270.1(c)(5) and (6).* If a post-closure permit is required, the permit must address applicable Part 264 Groundwater Monitoring, Unsaturated Zone Monitoring, Corrective Action, and Post-closure Care Requirements of this chapter. . . .

40 CFR § 270.1(c) (1988), 52 Fed.Reg. at 45,798 (emphasis added).

We now consider two sets of objections to the new language. One regards the first emphasized passage, which exempts certain owner/operators only if they *certified* closure by January 26, 1983. The other regards the second emphasized passage, which (through a series of cross references) has the effect of exempting owner/operators that "closed by removal" (i.e., by extracting the waste and shipping it elsewhere) *only* if their removal satisfied the part 264 standards, which are far more stringent than the part 265 "interim status" standards.

A. *Closure by certification v. mere cessation of receipt of waste.*

Several petitioners and intervenors (whom we refer to simply as petitioners) oppose the revision of § 270.1(c) contained in the *Final Second Codifi·tion Rule* on the grounds that it was adopted in final form without proper notice and comment, that the EPA lacked statutory au-

thority to promulgate the amendment, and that it was arbitrary and capricious. At issue, in substance, is the EPA's imposition of post-closure permitting requirements on facilities that ceased receiving wastes before July 26, 1982 but failed to certify final closure to the EPA, as set out in 40 CFR § 265.115, until after January 26, 1983. We shall call these facilities the "early cessation-late certification facilities." The EPA's authority to require post-closure permits from facilities that continued receiving wastes *after* the earlier date ("late cessation-late certification") is not at issue because coverage of late cessation facilities is explicitly mandated by the HSWA's addition of § 3005(i) to RCRA:

> **Interim status facilities receiving wastes after July 26, 1982.**
>
> The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title [RCRA § 3004] to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under [RCRA § 3005(c)] shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under [RCRA § 3005(e), regarding interim status facilities] which receives hazardous waste after July 26, 1982.

RCRA § 3005(i), 42 U.S.C. § 6925(i) (Supp. IV 1986).

Moreover, the *Proposed Second Codification Rules* plainly purported to cover late-cessation facilities, see *Proposed Second Codification Rule*, 51 Fed.Reg. 10,706, 10,715/3 (Mar. 28, 1986), so that as to them there can be no claim of defective notice.

The dates originate with EPA's *Interim Final Rules* for RCRA. 47 Fed.Reg. 32,274 (July 26, 1982). EPA published these on July 26, 1982 (which we will sometimes refer to

as "the earlier date"), to take effect on January 26, 1983 (sometimes referred to as "the later date").

Petitioners' notice and comment argument arises out of the indisputable point that the *Final Second Codification Rule*'s version of § 270.1(c) differed radically from the language of the proposed rule. Although the *Proposed Second Codification Rule* expanded the post-closure permit requirement to include facilities that continued to receive waste after the earlier date (late-cessation facilities), 51 Fed.Reg. 10,706, 10,715 (Mar. 28, 1986), it did not discuss early cessation-late certification facilities. Indeed language in the preamble to the *Proposed Second Codification Rule* suggested that EPA did not believe that the post-closure permit requirement applied to any facilities that ceased receiving waste before the earlier date: it stated that its change was needed because existing rules "subjected such units to these requirements only if they received waste after [the later date]." *Id.* As we will see, petitioners seek to hold the EPA to this characterization of the status quo ante. Among EPA's several replies is the claim that its 1986 statement about the status quo ante was inaccurate when made, and that the language of the *Final Second Codification Rule*, denying relief to early cessation-late certification facilities, was no more than explicit confirmation of the true status quo ante.

As is doubtless apparent by now, closure is an elastic concept. A considerable period of time may pass between when a facility ceases to receive waste and when its management elects to make a certification of closure, as required under 40 CFR § 265.115 (1988). See, e.g., Brief of Petitioners Waste Management of North America, Inc. and Chemical Waste Management, Inc. at 12 ("several years frequently pass between the last receipt of waste and certification of closure"). Evidently a substantial number of facilities received no waste after the earlier date but did not certify closure until after the later date.

The heart of EPA's position (or at least of one of its positions) is that at some time well before the *Proposed Final Second Codification Rule*, it had established, as the true meaning of the then-existing version of 40 CFR § 270.1(c), that late-certification facilities were required to obtain a post-closure permit regardless of when they had stopped receiving waste. See *Final Second Codification Rule*, 52 Fed. Reg. at 45,794/3-95/1 (Dec. 1, 1987). In the preamble to the final rule, EPA therefore noted its agreement with commentators who viewed the *Proposed Second Codification Rule* as having the unintended effect of *relaxing* the post-closure permit requirement for early cessation-late certification facilities. See *id.* Thus it explained the final rule's explicit coverage of early cessation-late certification facilities as a mere correction of an inadvertently created "loophole," and observed that "the term 'closure' in this context has been clarified to mean certification of closure according to § 265.115." *Id.* at 45,795/1. If indeed 40 CFR § 270.1(c) had by 1986 acquired the meaning that EPA asserts, then, despite the blunder of the proposed rule, a simple retreat to the status quo ante can properly be viewed as a "logical outgrowth" of the proposed rule. See *NRDC v. Thomas*, 838 F.2d 1224, 1242-43 (D.C.Cir.1988). One logical outgrowth of a proposal is surely, as EPA says, to refrain from taking the proposed step.

We will spare the reader a review of all the regulatory product that, in EPA's view, established the notion that closure for these purposed meant certification. In fact, at least to some members of the panel, utterances claimed by EPA to assert that meaning actually assert or imply the opposite. Nonetheless, assuming the worst of the pre-1985 materials, we believe that by 1985, in the *First Codification Rule*, EPA did in fact formally adopt the view it now espouses.

As part of its discussion of the exact issue in question here—the scope of the post-closure permit requirements—

the EPA stated that "facilities which closed before January 26, 1983, are not required to obtain post-closure permits." 50 Fed. Reg. at 28,712. In a footnote to that sentence, the EPA provided what was undoubtedly its clearest definition of closure before the 1987 "clarification":

> It should be noted that "closure" in this context does not mean simply ceasing to place waste in a unit. Closure, as a regulatory concept under these rules, is a proceeding during which EPA determines, after public review, that the facility has an adequate closure plan and that the facility implements that plan. Thus, closure is not complete under the hazardous waste regulations until a certification of closure has been given under 40 C.F.R. § 265.115.

Id. at 28,712 n. 14.

A single footnote tucked away in the Federal Register in minuscule type is far from the best means of giving notice of an important change in policy. Compare *National Air Transportation Ass'n v. McArtor*, 866 F.2d 483, 485 (D.C.Cir.1989) (holding that preamble with misleading boldfaced headings and summary paragraphs could not provide constructive notice even though a "thorough and alert reader" could have deduced its true effects), with *Williston Basin Interstate Pipeline Co. v. FERC*, 874 F.2d 834, 836-37 (D.C.Cir.1989) (holding surcharge exemption contained in footnote to attachment to pipeline's effective tariff is covered by filed rate doctrine). Moreover, as the subjection of early cessation-late certification facilities to corrective action requirements cannot rest on the HSWA (§ 3005(i) addresses only late cessation facilities), petitioners argue that the footnote did not belong in purported implementations of HSWA. "Petitioners had no reason to look in a HSWA codification rule for a regulatory change not based on HSWA." Reply Brief of Petitioners and Intervenors at 22. Indeed, the EPA failed to cite any statutory or even prior regulatory authority in the footnote.

We are not persuaded by the claim of inadequate notice of the 1985 clarification. Apart from the *First Codification Rule's* focus on the HSWA, petitioners suggest nothing in its captions, headnotes or other features that would, as in *National Air Transport Ass'n*, have erroneously caused an affected party to put the material down before reaching the critical passage. And the headnotes' attention to the HSWA does not appear deceptive in the present context. The HSWA was simply a set of *amendments* of RCRA; anyone subject to RCRA knew that, as a general matter, any regulations implementing HSWA necessarily carried serious risks for him.

Accordingly we accept EPA's contention that the explicit definition of closure in its 1987 version of 40 CFR § 270.1(c) was indeed no more than a formal restatement of what it had established no later than 1985, and thus may be viewed as a logical outgrowth of the proposal to amend § 270.1(c).

The argument that § 270.1(c) exceeded EPA's statutory authority rests essentially on one point: when the EPA, in the *Final Second Codification Rule*, 52 Fed.Reg. at 45,794-95, confirmed its 1985 position that closure meant certification, its only assertion of statutory authority remained the proposed rule's mention of § 3005(i), see 51 Fed.Reg. at 10,715/3, a reference that was clearly of no use as it covered only late-cessation facilities.

Although EPA did not cite specific statutes for the post-closure permit requirement, it did (at 52 Fed.Reg at 45,794/2) cite passages of the preamble to its *Interim Final Rules*, 47 Fed.Reg. 32,274, 32,291/3-92/1, 32,336/1 (July 26, 1982), at which it had rested its post-closure permit requirements squarely upon RCRA § 3004, 42 U.S.C. § 6924 (renumbered RCRA § 3004(a), 42 U.S.C. § 6924(a), after the adoption of the HSWA). This section directs the agency to establish standards for treatment, storage or disposal of hazardous waste. In the preamble to the 1982 rules, it had

argued that permits were no more than a devise for tailoring the § 3004 standards to the precise specific conditions. Thus EPA may fairly be said to have explicitly, though indirectly, rested the coverage of late cessation-late certification units on 42 U.S.C. § 6924(a) (Supp. IV 1986).

Finally, petitioners contend that the amendment of 40 CFR § 270.1(c) was arbitrary and capricious because EPA failed to justify "its abrupt reversal" of the position that "closure" was achieved by a facility's ceasing to receive wastes. See Joint Brief of Petitioners and Intervenors at 65-68. Naturally this falls, given our view of the regulation's history.

We therefore reject the petitioners' challenge to EPA's application of the post-closure permit requirement to facilities that ceased receiving waste before the earlier date but certified closure after the late date.

B. *"Closure by Removal"*

Certain facilities quite lawfully executed "closure by removal" (i.e., by extraction of the hazardous wastes) under "interim status" regulations applicable in 1980-87. Under the current regulations, EPA rejects this form of closure as a basis for exemption from corrective action requirements, and accepts closure by removal as a basis for exemption only if it satisfies certain more stringent removal standards. Several petitioners and intervenors, again simply referred to as petitioners, attack this decision.

Under RCRA as it existed before the HSWA of 1984, certain facilities that were already in existence when the interim RCRA standards took effect on November 19, 1980, and which complied with certain other requirements, were eligible for "interim status" upon applying for a permit—i.e., could continue to operate, just as if they had a permit. RCRA § 3005(e), 42 U.S.C. § 6925(e) (1982). HSWA expanded the scope of interim status to reach facilities

that were subject to RCRA only because of HSWA itself. See 42 U.S.C. § 6925(e)(1) (Supp. IV 1986).

The interim RCRA regulations in effect between 1980 and 1987 imposed no post-closure care responsibilities on interim status facilities that closed by removal ("clean closure") as provided in the Part 265 interim standards. See, e.g., 40 CFR § 265.228(b) (1986) (exempting surface impoundments from post-closure requirements if none of remaining wastes are "hazardous waste"). Complying facilities were free to leave the RCRA regulatory system and to use or convey the property for any other purpose. See § 265.119 (1988) (provisions designed to alert purchasers to history as waste facility). Facilities closing under this program were required to certify final closure according to § 265.115. See 40 CFR § 265.112(a) (1988); see also 40 CFR § 265.112(a) (1988); see also 40 CFR at note foll. § 265.120 (1986) (giving former version of § 265.112(a)).

In the *Proposed Second Codification Rule* EPA proposed to amend § 270.1(c) to impose corrective action requirements on facilities that received waste after July 26, 1982 and closed by removal under interim standards, unless they could show that they had not only removed all hazardous waste (thus satisfying the interim standard), but also removed all hazardous constituents (as required by part 264, the standard applicable to permitted facilities). 51 Fed.Reg. at 10,716/1-2, 10,722. EPA rested the change on the language of § 3005(i), quoted in full at p. 399, *supra*, which provides that whatever corrective action requirements apply to fully permitted facilities should also reach interim status facilities that received waste after July 26, 1982. Essentially it argued that Congress's concerns would not be met unless removal encompassed hazardous constituents as well as hazardous wastes. (As we have seen, the former may be present without the latter.) The *Final Second Codification Rule* also adopted this view. See 52 Fed.Reg. at 45,798-99.

Petitioners complain that § 3005(i) does not give the EPA the authority to impose such a retroactive post-closure burden on facilities that lawfully closed under the interim status provisions. The argument rests on the entirely accurate point that § 3005(i) does not mention "closure or permits." Accurate, but inconsequential. Section 3005(i) provides that the new corrective action requirements "shall also apply" to any unit "[1] qualifying for the authorization to operate under [the interim status provisions] [2] which receives hazardous waste after July 26, 1982." We do not understand petitioners to assert that the units in dispute fail to meet both those criteria. It is obviously true that for a unit that closed by removal under the interim standards in 1983, for example, "qualifying" for interim status on the date of HSWA's enactment in 1984 would (apart from this provision) have appeared to be no more than an irrelevance of ancient history. But unless Congress assumed that closure would always be interminable, it must have supposed that such units would be retroactively swept under the stricter requirements. As for "permits," the petitioners do not here contest the general proposition that post-closure permitting requirements are a reasonable method for implementing the substantive burdens Congress imposed.

Petitioners argue that the EPA's reading of § 3005(i) drastically disrupts the status quo. Once a unit is closed by removal under interim status it becomes eligible for sale or new construction. Subjection to the corrective action duties (or attaining exemption by compliance with the more stringent closure by removal standards) may be especially burdensome for such units and may upset expectations derived from completing closure by removal under the interim standards. Petitioners suggest accordingly that it would be more reasonable to construe the statute to exempt them. Assuming that finding such an implied exemption would be permissible, however, we certainly can-

not say that EPA's more literal reading is impermissible. Accordingly, we must affirm.

IV. Authority to Issue Post-Closure Permits in States That Have § 3006(b) Authorization

RCRA allows states to apply for authorization to administer their own hazardous waste programs in lieu of the EPA's. EPA must approve the state's request if the state's program is equivalent to and consistent with the federal one and if it provides adequate enforcement. See RCRA § 3006(b), 42 U.S.C. § 6926(b) (Supp. IV 1986). EPA's HSWA powers, however, do not automatically devolve to states with § 3006(b) authorization. Instead, the EPA must retain the responsibility for administering and enforcing HSWA requirements until states—even those with § 3006(b) approval—can demonstrate that they are prepared to undertake the specific tasks HSWA mandates:

> Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage, or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized State program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement [sic] directly in each such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

RCRA § 3006(g)(1), 42 U.S.C. § 6926(g)(1) (Supp. IV 1986). As a result, in a state that enjoys § 3006(b) authorization, the first step in determining whether relevant permitting and enforcement is to be conducted by federal or state regulators is to inquire whether the EPA's authority to

issue a given requirement rests on the 1984 HSWA or on other, pre-HSWA authority.

Earlier we upheld the EPA's statutory authority to require early cessation-late certification facilities to seek RCRA post-closure permits. See § III.A above. Petitioners Waste Management of North America, Inc. and Chemical Waste Management, Inc., though joining in the unsuccessful contention on that issue, request in the alternative that we declare that the agency's sole authority for permits required by the Second Codification Rule" is the HSWA. Petitioners here appear most alarmed by a passage in the preamble that concludes:

> In many cases EPA will be able to defer to the states in their efforts to implement their programs, rather than take separate actions under Federal authority.

52 Fed.Reg. 45,788, 45,796.

We find the issue as posed extremely ambiguous. There *appears* to be no dispute between the parties that substantive corrective action requirements resting on the HSWA, listed by EPA at 40 CFR § 270.1(j) (1988), must be enforced exclusively by the EPA in the absence of specific authorization under § 3006(g). *Cf.* 40 CFR § 271.24 (1988) (procedure for interim § 3006(g) authorization). Insofar as the preamble passage cited by petitioners may suggest the contrary, the EPA repudiates it as "a single sentence . . . taken out of context." EPA Brief at 71. We take this repudiation as authoritative and binding. We cannot be in the position of "reviewing" preamble language whose meaning is obscure to begin with and which the agency neither explicates nor defends when challenged. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967) (ripeness doctrine is intended to protect the courts "from entangling themselves in abstract disagreements over administrative policies").

Apart from the dispute over preamble chaff, we take petitioners to argue that because the application of a post-closure permit requirement to early cessation-late certification facilities appeared (as they see it) only in the *Final Second Codification Rule*, it must rest on HSWA. In fact, we have found that the EPA made that ruling in the *First Codification Rule*, in the much disputed footnote. That presumably leaves their claim the same, as the latter was also promulgated primarily to implement HSWA.

On its face, however, this aspect of petitioners' claim is puzzling. All agree that the requirement of a post-closure permit for such facilities *cannot* rest on HSWA itself, for § 3005(i) speaks only to late cessation facilities. See III.A above. Thus, insofar as petitioners' claim relates to *substantive* requirements that do not derive from HSWA, we are puzzled as to the basis for supposing that such non-HSWA requirements would be covered by § 3006(g)'s insistence on federal enforcement. However, once we put aside the now repudiated preamble passage, it seems plain that the rules here under review said nothing on this jurisdictional issue; accordingly we do not address it. See *Abbott Laboratories*, 387 U.S. at 148-49.

V.

In summary, we affirm the EPA on most, but not all, points. The EPA may impose HSWA corrective action requirements on Bevill-Bentsen wastes even though such wastes are exempt from regulation as hazardous waste under RCRA Subtitle C. We reject as untimely petitioners' claims that § 3004(u) does not encompass post-closure permits or permits by rule. And we uphold the EPA's amendment of the RCRA permit scope requirement, 40 CFR § 270.1(c), insofar as it requires post-closure permits from facilities that closed before July 26, 1982 but failed to certify closure before January 26, 1983 and insofar as it embraces facilities that closed by removal under part 265 interim status rules but received hazardous waste after

July 26, 1982. We can identify no ripe issue relating to matters of federal as against state permitting authority.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 88-1155

American Iron and Steel Institute

Petitioner

v.

U. S. Environmental Protection Agency

Respondent

American Petroleum Institute, Edison Electric Institute, et al.,

Intervenor

and Consolidated Cases

BEFORE: Mikva and Williams, Circuit Judges, and Will, Senior District Judge, U. S. District Court for the Northern District of Illinois

ORDER

Upon consideration of the petitions for rehearing of American Mining Congress, et al. and PPG Industries, Inc., et al., it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

November 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 88-1155

American Iron and Steel Institute
Petitioner

v.

U. S. Environmental Protection Agency
Respondent

American Petroleum Institute, Edison Electric Institute, et al.,
Intervenor

and Consolidated Cases

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

The Suggestions For Rehearing *En Banc* of American Mining Congress, et al. and PPG Industries, Inc., et al., have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

November 27, 1989

APPENDIX B

RESOURCE CONSERVATION AND RECOVERY ACT

Sec. 3001 IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

(a) CRITERIA FOR IDENTIFICATION OR LISTING.–

Not later than eighteen months after the date of the enactment of this Act, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subtitle, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.

(b) IDENTIFICATION AND LISTING.–

(1) Not later than eighteen months after the date of enactment of this section, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 1004(5), which shall be subject to the provisions of this subtitle. Such regulations shall be based on the criteria promulgated under subsection (a) and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subtitle solely because of the presence in such wastes of certain constituents (such as iden-

tified carciongens, mutagens, or teratagens) at levels in excess of levels which endangers health.

* * *

(3)(A) Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall, except as provided in subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subtitle until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 8002 of this Act and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:

(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

(iii) Cement kiln dust waste.

(B)(i) Owners and operators of disposal sites for wastes listed in subparagraph (A) may be required by the Administrator, through regulations prescribed under authority of section 2002 of this Act—

(I) as to disposal sites for such wastes which are to be closed, to identify the locations of such sites through surveying, platting, or other measures, together with recordation of such information on the public record, to assure that the locations where such wastes are disposed of are known and can be located in the future, and

(II) to provide chemical and physical analysis and composition of such wastes, based on available information, to be placed on the public record.

* * *

(C) not later than six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p), of section 8002 of this Act, the Administrator shall, after public hearings and opportunity for comment, either determine to promulgate regulations under this subtitle for each waste listed in subparagraph (A) of this paragraph or determine that such regulations are unwarranted. The Administrator shall publish his determination, which shall be based on information developed or accumulated pursuant to such study, public hearings, and comment, in the Federal Register accompanied by an explanation and justification of the reasons for it.

* * *

Sec. 3004 STANDARDS APPLICABLE TO OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

* * *

(u) CONTINUING RELEASES AT PERMITTED FACILITIES.—

Standards promulgated under this section shall require,

and a permit issued after the date of enactment of the Hazardous and Solid Waste Amendments of 1984 by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subtitle, regardless of the time at which waste was placed in such unit. Permits issued under section 3005 shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

* * *

(x) MINING AND OTHER SPECIAL WASTES.—

If (1) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium, (2) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, or (3) cement kiln dust waste, is subject to regulation under this subtitle, the Administrator is authorized to modify the requirements of subsections (c), (d), (e), (f), (g), (o), and (u) and section 3005(j), in the case of landfills or surface impoundments receiving such solid waste, to take into account the special characteristics of such wastes, the practical difficulties associated with implementation of such requirements, and site-specific characteristics, including but not limited to the climate, geology, hydrology and soil chemistry at the site, so long as such modified requirements assure protection of human health and the environment.

Sec. 8002 SPECIAL STUDIES; PLANS FOR RESEARCH, DEVELOPMENT, AND DEMONSTRATIONS

(f) MINING WASTE

The Administrator, in consultation with the Secretary of the Interior, shall conduct a detailed and comprehensive

study on the adverse effects of solid wastes from active and abandoned surface and underground mines on the environment, including, but not limited to, the effects of such wastes on humans, water, air, health, welfare, and natural resources, and on the adequacy of means and measures currently employed by the mining industry, Government agencies, and others to dispose of and utilize such solid wastes and to prevent or substantially mitigate such adverse effects. Such study shall include an analysis of—

(1) the sources and volume of discarded material generated per year from mining;

(2) present disposal practices;

(3) potential dangers to human health and the environment from surface runoff of leachate and air pollution by dust;

(4) alternatives to current disposal methods;

(5) the cost of those alternatives in terms of the impact on mine product costs; and

(6) potential for use of discarded material as a secondary source of the mine products.

In furtherance of this study, the Administrator shall, as he deems appropriate, review studies and other actions of other Federal agencies concerning such wastes with a view toward avoiding duplication of effort and the need to expedite such study. Not later than thirty-six months after October 21, 1980, the Administrator shall publish a report of such study and shall include appropriate findings and recommendations for Federal and non-Federal actions concerning such effects. Such report shall be submitted to the Committee on Environment and Public Works of the

United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.

* * *

(n) MATERIALS GENERATED FROM THE COMBUSTION OF COAL AND OTHER FOSSIL FUELS

The Administator shall conduct a detailed and comprehensive study and submit a report on the adverse effects on human health and the environment, if any, of the disposal and utilization of fly ash waste, bottom ash waste, slag waste, flue gas emission control waste, and other byproduct materials generated primarily from the combustion of coal or other fossil fuels. Such study shall include an analysis of—

(1) the source and volumes of such material generated per year;

(2) present disposal and utilization practices;

(3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials;

(4) documented cases in which danger to human health or the environment from surface runoff or leachate has been proved;

(5) alternatives to current disposal methods;

(6) the costs of such alternatives;

(7) the impact of those alternatives on the use of coal and other natural resources; and

(8) the current and potential utilization of such materials.

In furtherance of this study, the Administrator shall, as he deems appropriate, review studies and other actions of

other Federal and State agencies concerning such material and invite participation by other concerned parties, including industry and other Federal and State agencies, with a view toward avoiding duplication of effort. The Administrator shall publish a report on such study, which shall include appropriate findings, not later than twenty-four months after October 21, 1980. Such study and findings shall be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.

(o) CEMENT KILN DUST WASTE

The Administrator shall conduct a detailed and comprehensive study of the adverse effects on human health and the environment, if any, of the disposal of cement kiln dust waste. Such study shall include analysis of—

(1) the source and volumes of such materials generated per year;

(2) present disposal practices;

(3) potential danger, if any, to human health and the environment from the disposal of such materials;

(4) documented cases in which danger to human health or the environment has been proved;

(5) alternatives to current disposal methods;

(6) the costs of such alternatives;

(7) the impact of those alternatives on the use of natural resources; and

(8) the current and potential utilization of such materials.

In furtherance of this study, the Administrator shall, as he deems appropriate, review studies and other actions of other Federal and State agencies concerning such waste or

materials and invite participation by other concerned parties, including industry and other Federal and State agencies, with a view toward avoiding duplication of effort. The Administrator shall publish a report of such study, which shall include appropriate findings, not later than thirty-six months after October 21, 1980. Such report shall be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.

(p) MATERIALS GENERATED FROM THE EXTRACTION, BENEFICIATION, AND PROCESSING OF ORES AND MINERALS, INCLUDING PHOSPHATE ROCK AND OVERBURDEN FROM URANIUM MINING

The Administrator shall conduct a detailed and comprehensive study on the adverse effects on human health and the environment, if any, of the disposal and utilization of solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from uranium mining. Such study shall be conducted in conjunction with the study of mining wastes required by subsection (f) of this section and shall include an analysis of—

(1) the source and volumes of such materials generated per year;

(2) present disposal and utilization practices;

(3) potential danger, if any, to human health and the environment from the disposal and reuse of such materials;

(4) documented cases in which danger to human health or the environment has been proved;

(5) alternatives to current disposal methods;

(6) the costs of such alternatives;

(7) the impact of those alternatives on the use of phosphate rock and uranium ore, and other natural resources; and

(8) the current and potential utilization of such materials.

In furtherance of this study, the Administrator shall, as he deems appropriate, review studies and other actions of other Federal and State agencies concerning such waste or materials and invite participation by other concerned parties, including industry and other Federal and State agencies, with a view toward avoiding duplication of effort. The Administrator shall publish a report of such study which shall include appropriate findings, in conjunction with the publication of the report of the study of mining wastes required to be conducted under subsection (f) of this section. Such report and findings shall be submitted to the Committee on Environment and Public Works of the United States Senate and the Committee on Energy and Commerce of the United States House of Representatives.

APPENDIX C

125 Cong. Rec. 13,244-45 (1979)

Mr. HUDDLESTON. Mr. President, it is my understanding that this amendment has been cleared by the committee on both sides of the aisle.

I rise to offer an amendment to the Solid Waste Disposal Act Amendments of 1979, relating to the regulation of byproducts produced from the combustion of coal and other fossil fuels. The Senate is well aware of the interest of my State in the production and utilization of coal and the status of Kentucky as a leading producer of this vital fuel. The present and anticipated shortage of petroleum products once again has illustrated this Nation's overreliance on the dwindling supply of oil as a major source of energy, and our corresponding failure to utilize our most abundant energy source—coal.

Unfortunately, many Government regulatory programs have the effect of adding to this country's failure to fully utilize our coal resources.

* * *

One program which could produce such a result is that proposed by the Environmental Protection Agency under the authority of the Solid Waste Disposal Act to regulate the management and control of hazardous waste from generation to final disposal. Testimony at the hearings indicated that this regulatory program, crucial for protection of this Nation's environmental quality through the control of truly hazardous wastes, could well, because of its overly broad implementation, include the overcontrol of materials such as byproducts of coal and other fossil fuel combustion—fly ash, bottom ash, and flue-gas emission control waste—which have never been demonstrated to be environmentally harmful. Solid waste byproducts of the combustion of coal and other fossil fuels have been present in the environment of this country since fossil fuels were first

used, and our practical experience with these byproducts has revealed no instance where the ash, slag, or sludge could be shown to have posed a substantial hazard to human health or the environment.

Nonetheless, the interim regulations proposed for these fossil fuel combustion byproducts, including an estimated $1 billion of additional costs over a 3-year period for the electric utility industry alone. These burdens and costs would be imposed despite the fact that EPA has admitted to a lack of information on the degree of hazard, if any, of these wastes, and recognizes that any potential hazards are relatively low.

* * *

This amendment recognizes that the regulatory program proposed by EPA would have a significant impact on the utilization of coal and other fossil fuels and the reuse of their combustion byproducts. Therefore, additional regulations on these materials would not be promulgated until further information is developed to determine whether a sufficient degree of hazard exists to warrant additional regulations, and whether existing State or Federal programs adequately control any such hazards. In the rulemaking proceeding provided for in my amendment, the Administrator should be extremely cautious in imposing any additional regulations on these materials, particularly in view of the resulting discouragement of coal use and the recovery and reuse of valuable fossil fuel combustion byproducts.

* * *

126 Cong. Rec. 3361-65 (1980)

Mr. BEVILL. Mr. Chairman, I rise to offer an amendment to H.R. 3994, the Resource Conservation and Recovery Act Amendments of 1979. I believe this amendment is of vital importance to our Nation, particularly in light of the President's recent focus of our attention on the need to develop our domestic coal resources.

* * *

The amendment would encourage development of coal as a primary domestic source of energy, avoid unnecessary inflationary impact, and focus the efforts of the Environmental Protection Agency in implementing the Resource and Conservation and Recovery Act toward activities truly necessary to protect public health and the environment specifically, it would require EPA to defer imposition of regulatory requirements on the disposal of the waste byproduct of fossil fuel combustion, of discarded mining materials and of cement kiln dust waste until after EPA has completed studies to determine whether, if at all, these materials present any hazard to human health or the environment. These studies would include evaluation of the economic and environmental aspects of existing and alternative disposal and reuse options. EPA would also be required to focus on the impact of these alternatives on the use of our coal and other natural resources.

* * *

The effect on coal usage of the regulations EPA has proposed under RCRA clearly would constitute an unnecessary and ill-timed regulatory burden. Responsible estimates of their impact by the utility industry—a major consumer of fossil fuel in this Nation—indicated a $1 billion increase in the cost of the production of electricity from coal over the first 3 years they are imposed. Additional billions of dollars of costs would be imposed over the coming decades. These costs are likely to be passed along to

consumers, with an immediate inflationary impact. Moreover, imposition of these costs on those who burn coal cannot help but discourage the switching from reliance on oil to reliance on domestic coal.

* * *

Finally, let me direct the House's attention to the fact that after EPA concludes these studies, it will be required to obtain public views on them and to make known whether, as a result of this process, EPA believes any regulation of these materials is necessary. This requirement is especially important in view of our national commitment to develop a coherent and consistent policy toward the use of our coal and other energy resources.

This requirement will focus public attention on the issue of whether regulation is consistent with our national policy goals. It will also allow interested parties to evaluate the basis of the Agency's decision, and to address the question of what degree of regulation, if any, is appropriate.

Mr. Chairman, I would close by citing just a few of these national policy goals. The President has asked that we establish an Energy Mobilization Board to expedite development of critical energy facilities. It makes no sense for EPA to simultaneously impose unnecessary regulations on coal users. The President has asked that we require utilities to cut oil consumption by 50 percent. This requires that they burn coal. It makes no sense for EPA to simultaneously act to discourage coal conversions and constructions of new coal-fired capacity. The President has asked that we join hands to fight inflation. It makes no sense for EPA to needlessly impose expensive regulations. For those reasons, Mr. Chairman, I urge the adoption of this amendment.

* * *

Mr. FINDLEY. Mr. Chairman, much of the debate sur-

rounding the Resource Conservation and Recovery Act tends to emphasize the need for stricter environmental controls for handling hazardous wastes. However, for such wastes as fly ash and slag, less control is needed.

* * *

If the Agency is successful in classifying fly ash and slag as hazardous wastes, their reuse will be discouraged or eliminated. EPA's decision to treat these relatively harmless byproducts as special hazardous wastes subject to stringent regulation will only hasten the decline of the coal industry in this country and that is something we can ill afford. In addition, it has been calculated that EPA's proposed regulations for these byproducts would add $1 billion over a 3-year period to the cost of producing electricity, costs which will be passed along to already inflation saddled consumers.

* * *

Mr. RAHALL. I comment the gentleman from Alabama for his amendment. I rise in support of the Bevill amendment to the Resource Conservation and Recovery Act of 1976 that would require EPA to evaluate a variety of aspects of coal byproduct management before imposing regulations upon these materials under this act.

I view the proposed amendment as an integral element of our national energy policy. At a time when we are seeking to encourage electric utilities and others to switch from the burning of oil to coal, it would be highly inappropriate to place further unnecessary regulatory roadblocks in the way of increased coal usage.

Indeed, this amendment may very well serve the same purpose as the President's proposed Energy Mobilization Board. It will be a step toward the elimination of delay and unnecessary paperwork in the development of our domestic energy resources. Coal is our most abundant and

readily available domestic energy source. To break the grip of foreign energy suppliers on our industry, we must promote its use, not deter it.

* * *

Mr. WILLIAMS of Montana. Mr. Chairman, I, too, want to commend the gentleman for his amendment.

Mr. Chairman. I rise in support of the amendment offered by the gentleman from Alabama.

This amendment would direct the Environmental Protection Agency to evaluate certain high volume, low toxicity wastes so as to assure a reasoned set of regulations by which to manage these wastes. My interest in this amendment is in the area of wastes from mineral production. Mining and processing of minerals is a major industry in my congressional district. My discussion of the wastes generated by the mining industry has illustrated for me the wisdom of this amendment.

As has been stated, this amendment would merely suspend regulation of these wastes for a reasonable period of time until more is known about them. What is known? With regard to slag wastes generated by the smelting of copper, the National Academy of Sciences has recently reported that it "is basically inert and weathers slowly." The slag produced 2,500 years ago at King Solomon's mines north of Eliat, Israel, has not changed perceptibly over time.

Should wastes such as smelting slag be subject to stringent regulations at this time? I think not—not until a thorough study is conducted by the responsible agency which clearly proves the need for additional regulation.

* * *

Mr. STAGGERS. Mr. Chairman. I rise in support of the amendment offered by the distinguished gentleman from

Alabama (Mr. Bevill), and commend him for his diligent efforts in formulating a reasonable and balanced approach to a difficult issue. This amendment is necessary to insure that genuinely necessary environmental regulation does not include overregulation of coal mining and inhibit coal utilization. As everyone in this Chamber knows, the coal industry is vital to the economy of my State and to the solution of this Nation's energy problems. The EPA regulatory program being discussed here today is one of several Government regulatory programs which, in fact, discourage the increased utilization of coal by imposing overlapping and duplicative regulatory requirements. The program would have this unfortunate effect due to its proposed inclusion of both coal mining and coal combustion wastes within the scope of EPA's hazardous waste program in a "special waste" category.

* * *

We must avoid placing unnecessary roadblocks in the way of developing our coal resources. This amendment continues to subject specified byproducts of fossil fuel combustion, coal mining wastes and the other so-called special wastes to existing regulatory programs under presently applicable Federal and State laws, but would preclude, until after completion of the required study and rulemaking, any EPA regulation of these wastes under subtitle C of RCRA. This amendment is necessary to insure that the results of the studies to be undertaken have not been prejudged or undermined by imposition of regulation prior to an actual determination of the necessity for it.

APPENDIX D

Final Rule
July 15, 1985
50 Fed. Reg. 28,702

On November 8, 1984, the President signed into law the Hazardous and Solid Waste Amendments of 1984 (HSWA). This new statute makes many changes to EPA's existing hazardous waste management program. The purpose of this rule is to amend EPA's existing hazardous waste regulations to reflect those statutory provisions that have immediate or short-term effects on the regulated community.

* * *

D. Estimated Cost of the Final Rule

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14. Total Cost of the Final Rule

The sum of all the annualized costs ranges from a lower bound of $365 million to $2.1 billion. Table VI-2 shows these annualized costs as well as the first year costs, which range between $1.9 billion and $14.5 billion. Corrective action costs dominate both first year and annualized costs in each scenario. The Agency is soliciting comments on these cost estimates.

TABLE VI-2.—COSTS OF FINAL RULE

Provisions	Lower bound		Upper bound		Most likely	
	First year costs	Annualized FY	First year costs	Annualized FY	First year costs	Annualized FY
Liquids in landfills	$7,419,100	$5,106,663	$14,838,200	$10,213,326	$11,128,650	$7,659,995
Minimum technological requirements	9,675,600	63,473,700	9,675,600	63,473,700	9,675,600	63,473,700
Corrective action[1]	1,831,591,141	279,506,264	14,179,396,623	1,789,394,619	3,765,989,500	475,814,086
Dust suppression	16,440,000	16,440,000	34,930,000	34,930,000	25,685,000	25,685,000
Small quantity generators	332,500	332,500	1,400,000	1,400,000	542,740	542,750
Burning and blending	0	0	166,920	166,920	107,640	107,640
Exposure assessments	1,906,560	176,213	1,906,560	176,213	1,906,560	176,213
Delisting procedures	1,515,000	482,295	1,515,000	482,295	1,515,000	482,295
Hazardous waste exports	2,250	2,250	12,000	12,000	6,563	6,563
Waste minimization	14,980	140,980	2,482,910	2,482,910	204,954	204,954
Financial responsibility	100,400	100,400	240,560,947	240,560,947	9,803,280	9,803,280
Underground storage tanks	6,215,000	(871,076)	6,215,000	1,113,446	0	0
Grand total	1,875,338,531	364,890,189	14,493,099,760	2,144,406,376	3,826,565,497	583,956,476

[1] Cost of corrective action includes the cost of source control for certain facilities.

Regulatory Determination
July 3, 1986
51 Fed. Reg. 24,496

I. Summary

Based on the Report to Congress, comments on the report, and other available information, EPA has determined that regulation of mining waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA) is not warranted at this time.

This conclusion is based on EPA's belief that several aspects of EPA's current hazardous waste management standards are likely to be environmentally unnecessary, technically infeasible, or economically impractical when applied to mining waste. While under existing law EPA would have some flexibility to modify its standards for hazardous waste management as applied to these wastes, there are substantial questions about whether the flexibility inherent in the statute coupled with the Agency's current data on these wastes provide a sufficient basis for EPA to develop a mining waste program under Subtitle C that addresses the risks presented by mining waste while remaining sensitive to the unique practical demands of mining operations. Given these uncertainties, EPA does not intend to impose Subtitle C controls on mining waste at this time.

The Agency, however, is concerned about certain actual and potential mining waste problems, and therefore plans to develop a program for mining waste under Subtitle D of RCRA. The long-term effectiveness of this program depends on available State resources for designing and implementing a program tailored to the needs of each State, and on EPA's ability to oversee and enforce the program. As noted below in section VI, EPA will be working with the States to determine the specific nature of their current mining waste activities and their future plans to administer such programs. The Administration will work with Congress to develop expanded Subtitle D authority

(i.e., Federal oversight and enforcement) to support an effective State-implemented program for mining waste. EPA has already made preliminary contacts with Congress and intends to hold detailed discussions on the specifics of the Subtitle D program in the coming year. In the interim, EPA will use RCRA section 7003 and CERCLA sections 104 and 106 to protect against substantial threats and imminent hazards. If EPA is unable to develop an effective mining waste program under Subtitle D, the Agency may find it necessary to use Subtitle C authority in the future.

* * *

IV. Report to Congress

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A. Summary of Report to Congress

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2. Waste Quantities

The Report to Congress estimated that 1.3 and 2 billion metric tons per year of nonfuel mining waste were generated in 1982 and 1980, respectively. The accumulated waste volume since 1910 from nonfuel mining is estimated to be approximately 50 billion metric tons. The large volume of annual and accumulated nonfuel mining waste results from the high waste-to-product ratios associated with mining. The fact that most of the material handled in mining is waste and not marketable product distinguishes mining from many other process industries where waste materials make up a relatively small portion of the materials used to produce a final product. Consequently, some of the larger mining operations handle more material and generate more waste than many entire industries.

* * *

6. Potential Costs of Regulation

The Report to Congress presented for five metal mining segments, total annualized costs ranging from $7 million

per year (for a scenario that emphasizes primarily basic maintenance and monitoring for wastes that are hazardous under the current RCRA criteria) to over $800 million per year (for an unlikely scenario that approximates a full RCRA Subtitle C regulatory approach, emphasizing cap and liner containment for all wastes considered hazardous under the current criteria, plus cyanide and acid formation wastes). About 60 percent of the total projected annualized cost at active facilities can be attributed to the management of waste accumulated from past production. Those segments with no hazardous waste (e.g., iron) would incur no costs. Within a segment, incremental costs would vary greatly from facility to facility, depending on current requirements of state laws, ore grade, geography, past waste accumulation, percentage of waste which is hazardous, and other factors.

B. Comments Received on the Report to Congress and EPA's Response

* * *

3. Potential Costs of Regulation

EPA received a large number of comments pertaining to the cost of complying with regulations for mining waste, and the effects these compliance costs would have on the mining industry. Many commenters claimed that regulating the mining industry would impose costs much greater than those EPA estimated in its Report to Congress. They also noted that the mining industry was depressed, and that for many mines, increased compliance costs would be greater than the profits leading to forced closures.

* * *

C. Mining Waste Conclusions

Based on the available information and public comments, the Agency draws the following conclusions about mining wastes. (BAI, 1986 see VII No. 1)

Source and Volume

• The waste volume generated by mining and beneficiation is considerably larger than the volume of waste generated by other industries currently subject to hazardous waste controls. The mining industry alone generates over one billion metric tons of waste per year compared to 260 million metric tons generated annually by all other hazardous waste industries. The average mining waste facility manages about three million metric tons of waste annually while the typical facility subject to Subtitle C controls manages about 50 thousand metric tons of waste per year.

• In general, mining waste disposal facilities are considerably larger than industrial hazardous waste disposal facilities; most of the largest industrial hazardous waste land disposal facilities are (tens of acres) in size, while typical mining waste disposal facilities are (hundreds of acres) in size. Agency studies indicate that mining waste tailings impoundments average about 500 acres; the largest is over 5000 acres. Mining waste piles average 126 acres; the largest exceeds 500 acres. Hazardous waste impoundments, however, average only about 6 acres and hazardous waste landfills average only about 10 acres. Consequently, EPA believes that many traditional hazardous waste controls may be technically infeasible or economically impractical to implement at mining waste sites because of their size.

Waste Management Practices

• EPA estimates indicate that most hazardous waste generators (about 70 percent) ship all of their waste off-site, however, no mines ship all of their waste off-site. In addition, nearly all mining waste is land disposed, while less than half of all industrial hazardous waste is land disposed.

Evidence of Damage

• In general, environmental conditions and exposure potential associated with mining waste are different than those associated with industrial hazardous waste streams. Agency studies suggest that mining waste streams generally have lower exposure and risk potential for several reasons.

— First, mining waste management facilities are generally in drier climates than hazardous waste management facilities, thereby reducing the leaching potential. Over 80 percent of the mining sites are located west of the Mississippi River, which generally has drier climates, whereas industrial hazardous waste landfills are more evenly distributed nationally. In addition, the Agency estimates that more than sixty percent of all mines have annual net recharge between 0-2 inches, and only ten percent have net recharge greater than ten inches. However, about 80 percent of the hazardous waste land disposal facilities have net recharge greater than five inches and over one-third exceed 15 inches.

— Second, EPA studies indicate that hazardous waste land disposal facilities are closer to ground water than mining waste sites. Over 70 percent of hazardous waste sites have a depth to ground water of 30 feet or less, while about 70 percent of mining sites have ground water depths greater than 30 feet.

— Third, Subtitle C facilities tend to be located in more densely populated areas. EPA estimates that mining waste sites have average populations of less than 200 within one mile of the site, while hazardous waste sites average over 2,000 people at the same distance. Within five miles of the mining waste sites, the average population is almost 3,000, while hazardous waste sites average nearly 60,000 people.

— Fourth, Agency studies suggest that, compared to mining waste sites, hazardous waste sites tend to be lo-

cated closer to drinking water receptors and serve larger populations. Almost 70 percent of the hazardous waste sites are located within five miles of a drinking water receptor serving an average population of over 18,000 and as many as 400,000 people. Almost half as many mining sites are located within this same distance, and they serve considerably smaller populations (averaging 3,000 but ranging as high as 20,000.)

• Although the Agency believes that the human exposure and risk potential appears to be lower for mining waste sites than for industrial hazardous waste sites, many mines are located in sensitive environmental settings. EPA estimates that about 50 percent of the mines are located in areas that have resident populations of threatened or endangered species or species of other special concern, (often the case for industrial sites). In addition, mining sites are typically located in relatively remote and otherwise undisturbed natural environments.

Cost and Economic Impacts

• EPA believes that many traditional waste management controls designed principally for industrial hazardous waste management facilities may be economically impractical to implement at mining sites and could impose substantial costs to the industry resulting in potential mine closures. Full Subtitle C controls for mining sites could impose as much as $850 million per year in compliance costs. Such costs could be greater than profits resulting in mine closures.

• Many Federal and State agencies already have regulatory programs for managing mining waste. New hazardous waste controls for mining waste could be difficult to integrate with existing Federal and State programs.

V. Application of Subtitle C to Mining Waste

EPA believes that it needs maximum flexibility to develop an appropriate program for mining waste which ad-

dresses the technical feasibility, the environmental necessity, and the economic practicality of mining waste controls. The program should consist of a tailored risk-based approach which addresses the diversity and unique characteristics of mining waste problems.

The current Subtitle C program is designed principally for controlling problems created by industrial wastes. Based on information available, the Agency believes that many controls required under the current Subtitle C program, if applied universally to mining sites, would be either unnecessary to protect human health and the environment, technically infeasible, or economically impractical to implement.

* * *

Section 3004(x) of RCRA does provide flexibility for regulating mining waste. This section gives EPA the authority to modify certain Subtitle C requirements for mining waste which were imposed by the Hazardous and Solid Waste Amendments of 1984 (HSWA) which relate to liquids in landfills, prohibitions on land disposal, minimum technological requirements, continuing releases at permitted facilities, and retrofitting interim status surface impoundments with liners. In modifying these requirements, EPA may consider site-specific characteristics as well as the practical difficulties associated with implementing such requirements. In addition, EPA has general authority under RCRA section 3004(a) to modify remaining Subtitle C requirements, such as administrative standards, financial requirements, and closure and capping requirements, if a waste poses different risks or the existing standards are technically infeasible. However, in modifying such requirements, section 3004(a) does not provide EPA the same degree of flexibility to consider the economic impact of regulation that is found in section 3004(x).

As described earlier in this notice, EPA believes that the decision whether to regulate mining waste under Sub-

title C must consider the factors listed in RCRA sections 8002(f) and (p), including the risks associated with mining waste, the cost of such regulation, and the effect regulation might have on the use of natural resources. EPA has concluded that in order to meet that objective, it would want to develop a program that has maximum flexibility to develop an effective control strategy for individual facilities based on site-specific conditions. The existing Subtitle C regulatory program would probably have to be changed substantially for mining waste to provide that type of flexibility.

Given these general conclusions about what would be needed to make the Subtitle C system appropriate for mining waste, there are substantial uncertainties about whether that program is the right mechanism to address mining waste. First, it is unclear whether the legal authorities under which EPA would be acting (i.e., sections 3004(a) and 3004(x)) give EPA sufficient flexibility to craft a program for "hazardous" mining waste given the statutory and regulatory approach established for other hazardous wastes. Second, and closely related, there are substantial questions about whether the Agency's current data on mining waste management provide a basis for substantial modifications to the existing Subtitle C regulatory program. With the mining waste study and the supplementary information collection efforts associated with today's notice, EPA has greatly expanded its understanding of mining waste management practices. At the same time, additional data collection and analysis would probably be necessary to support specific modifications of multiple provisions in the existing hazardous waste regulations before those regulations would provide the type of flexibility we currently believe might be necessary. These uncertainties have led us to the conclusion that Subtitle C does not provide an appropriate template for a mining waste management program.

VI. Application of Subtitle D to Mining Waste

Solid waste that is not hazardous waste is subject to regulation under Subtitle D. Therefore, mining waste, which is included in the RCRA definition of solid waste, is currently covered by Subtitle D. EPA believes that it can design and implement a program specific to mining waste under Subtitle D that addresses the risks associated with such waste. The current Subtitle D program establishes criteria which are, for the most part, environmental performance standards that are used by States to identify unacceptable solid waste disposal practices or facilities. (See 40 CFR Part 257). These criteria include, among other things, standards related to surface water discharges, ground-water contamination, and endangered species. Because the program's criteria are aimed principally at municipal and industrial solid waste, EPA believes they do not now fully address mining waste concerns. In addition, many of these criteria, such as control of disease vectors and bird hazards, are not appropriate for mining waste.

The Agency is currently revising these criteria for facilities that may receive hazardous household waste and small quantity generator hazardous waste; these revisions will not apply to mining waste which are generally not codisposed with such wastes. However, the Agency intends to further augment the Subtitle D program by developing appropriate standards and taking other actions appropriate for mining waste problems. EPA will focus on identifying environmental problems and setting priorities for applying controls at mining sites with such potential problems as high acid-generation potential, radioactivity, asbestos and cyanide wastes. EPA will also develop a risk-management framework to develop appropriate standards as necessary to protect human health and the environment. EPA will consider requirements such as: (1) A range of closure options to accommodate variable problems such as infiltration to ground water and exposure from fugitive dust; (2) options to define tailored controls, including those es-

tablished by the Clean Water Act, to address problems from runoff to surface water; (3) options for liquid management controls such as pretreatment of wastes prior to disposal, controlled release, or liner systems; (4) groundwater monitoring options that accommodate site-specific variability; and (5) a range of clean-up options.

Final Rule
December 1, 1987
52 Fed. Reg. 45,788

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[52 Fed. Reg. at 45,789-90]

One commenter expressed the opinion that the permit application information requirements of § 270.14(d) should not apply to units in which certain wastes identified under RCRA section 3001(b)(3)(A)(i), including fossil fuel combustion wastes, are managed. The commenter argued that such wastes are exempt from coverage under § 3004(u), and therefore should not be required to comply with information requirements promulgated pursuant to section 3004(u). To support his contention, the commenter pointed out that section 3001(b)(3)(A) provides that these specified wastes shall be "subject only to regulation under other applicable provisions of Federal or state law in lieu of Subtitle C of RCRA until at least six months after the date of the submission of the applicable study required to be conducted under subsection * * * (n) * * * of section 8002" of RCRA. The commenter thus argued that since section 3004(u) is located in Subtitle C of RCRA, its requirements do not apply to fuel combustion wastes.

This comment raises a significant issue of statutory interpretation that applies not only to wastes from fossil fuel combustion, but also to three other categories of wastes excluded under section 3001. Section 3001(b)(3), the provision quoted above, also addresses wastes from the extraction, beneficiation and processing of ores and minerals ("mining wastes"), and cement kiln dust wastes. This provision is commonly called the "Bevill amendment." In addition, section 3001(b)(2) subjects drilling fluids, produced waters, and other wastes associated with the production of crude oil or natural gas or geothermal energy ("oil and gas wastes") to a similar limitation.

EPA does not agree that these exclusions extend to corrective action for releases from solid waste management units under section 3004(u). EPA believes that Congress enacted these provisions in 1980 to prohibit EPA from regulating these wastes as "hazardous" while it studied the impacts of such regulation. When Congress enacted these exemptions in 1980, Subtitle C provided only for the regulation of hazardous waste. Hence, the reference to "this subtitle" indicated only an intent to exclude these special wastes from EPA's hazardous waste regulations.

Section 3004(u), however, does not fit in the 1980 statutory scheme. Although it is located in Subtitle C, it provides for clean-up of releases of "hazardous constituents" (not just hazardous wastes) from both hazardous waste and solid waste management units. Indeed, section 3004(u) is the only provision in Subtitle C that reaches beyond the universe of hazardous waste. Thus, the question of statutory interpretation for the Agency is whether the exemption, which extends to regulation "under Subtitle C", should be read as covering the authorities granted to EPA to correct releases of hazardous constituents at solid waste management units.

EPA does not believe that Congress intended the exemptions in section 3001, which were clearly aimed at hazardous waste, to extend to corrective action for solid wastes under section 3004(u). Certainly nothing in the plain language of the legislative history of section 3004(u) suggests that Congress intended to create any exemptions for any category of solid waste. Furthermore, the commenter conceded that fossil fuel combustion wastes are "solid wastes" subject to corrective action regulation under Subtitle D and emergency clean-up orders under Section 7003. (See the brief of petitioner Edison Electric Institute in *United Technologies Corporation* v. *EPA*, D.C. Cir. No. 85-1654 consolidated cases.) It is more logical and consistent with Congressional goals to conclude that these solid

wastes are similarly subject to clean-up requirements under section 3004(u).

An exemption from corrective action under section 3004(u) is also not necessary to achieve the goals of the original exemption in section 3001. The sponsors of the 1980 amendments were chiefly concerned with the lack of specific data showing that these solid wastes endangered human health and the environment, and the potential for disruptive economic impacts if these wastes were subject to regulation as hazardous wastes under Subtitle C. *See, e.g.*, 126 Cong. Rec. H1101-1102 (daily ed. Feb. 19, 1980) (remarks of Representative Bevill); 125 Cong. Rec. S6821 (daily ed. June 4, 1979) (remarks of Senator Huddleston). Section 3004(u), however, will not require any corrective action unless EPA obtains data showing that specific solid waste management units are releasing hazardous constituents in the manner that threatens human health and the environment. Furthermore, a decision to require clean-up under section 3004(u) will not require compliance with the full range of Subtitle C regulations. For example, the double liner retrofitting requirements in section 3005(j) would not apply to a solid waste management unit containing a Bevill waste or an oil and gas waste. Corrective action will not have the same economic impact as full Subtitle C regulation. As indicated, Congress provided for corrective action for solid wastes under Subtitle D and/or section 7003; coverage under section 3004(u) simply provides a linkage between corrective action and the hazardous waste permitting process.

In summary, EPA has concluded that "Bevill wastes" and oil and gas wastes are subject to the corrective action requirements of section 3004(u) when they are found in solid waste management units at facilities that need permits to manage hazardous wastes.

APPENDIX E

EPA REPORT TO CONGRESS: WASTES FROM THE COMBUSTION OF COAL BY ELECTRIC UTILITY POWER PLANTS (FEBRUARY 1988)

* * *

[p. 6-19, footnotes deleted]

6.2.2.3 Corrective Action

Subpart F of 40 CFR Part 264 also lists requirements for corrective action. A variety of actions may be undertaken to correct ground-water contamination problems caused by a hazardous waste disposal facility. The facility owner or operator would need to conduct a site-specific investigation to ascertain the potential degree of contamination and the appropriate response that would be most effective in remedying the situation. Types of remedial responses that might be required would be placing a cap (made of either a clay or synthetic material) on the disposal unit, counter-pumping the ground water to retard contaminant migration, excavating the disposal area and removing the wastes to a Subtitle C landfill, or installing an impermeable curtain around the disposal area to prevent ground-water flow into or out of the disposal area. As one example of the potential magnitude of corrective action costs, this section evaluates the cost to excavate the existing disposal areas and transfer the wastes to RCRA Subtitle C-approved facilities.

EPA developed the following formula to calculate total excavation costs for Subtitle C units, (including closure of the existing site and removal of the wastes to a Subtitle C facility):

Cost - [(Surface Area x $45) + (Volume x $187)] x 2.16

where the surface area is measured in square meters, and volume is measured in cubic meters.

For a power plant of average size (500 MW), it has been assumed that a 45-acre landfill would be required, or about 182,000 square meters, with a capacity of approximately 5 million cubic meters. Based on the cost equation listed above, costs for excavation and waste transfer for a landfill site would be about $2.0 billion. For surface impoundments, the appropriate parameters are 145 acres, or about 587,000 square meters, and a volume of about 5 million cubic meters, which works out to about $2.1 billion for the same type of corrective action. If this type of corrective action were required at all power plants, compliance costs for the industry would be enormous. At a cost of about $2 billion per plant, industry-wide costs would exceed one trillion dollars.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 8 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Options Selection Meeting on Development of a Regulatory Program for Corrective Action Under Section 3004(u)

FROM: J. Winston Porter
Assistant Administrator

TO: Addressees

* * *

ISSUE V: What technical standards should be applied to management of non-hazardous wastes during corrective action remedies?

Solid waste management units, addressed as part of RCRA corrective actions, will often contain wastes that do not meet the definition of "hazardous" but that nevertheless contain hazardous constituents. Such wastes may, if mismanaged, pose threats to human health and the environment. Outlined below are three options for the types of standards or controls that should be placed on management of non-hazardous wastes in the RCRA Subtitle C corrective action program.

OPTIONS:

(A) Apply Subtitle C standards to management (treatment, storage, and disposal) of all non-hazardous wastes generated as part of RCRA corrective action remedies.

(B) Manage non-hazardous wastes in accordance with Subtitle D standards.

(C) Apply appropriate standards on a case-by-case basis.

DISCUSSION:

Option A would preserve the status quo and apply the full range of Subtitle C design/operating standards (e.g. double liners, ground water monitoring, etc.) to on-site and off-site management of non-hazardous solid wastes. (Of course, if option B in Issue IV is adopted, specific Subtitle C standards could be waived for *temporary* units.) This approach would be the most environmentally conservative option. However, it could be argued that application of Subtitle C standards to wastes that are not defined as hazardous could be unreasonable for both technical and legal reasons. Solid wastes are likely to be inherently less threatening to human health and the environment than hazardous wastes. It could thus be argued that applying stringent Subtitle C standards to such wastes could provide relatively few environmental benefits, might significantly delay cleanup in certain circumstances, and could severely overload available capacity for managing hazardous waste.

Under option B, non-hazardous wastes would be managed under the Subtitle D program which sets minimum standards for solid waste disposal facilities. Although these regulations are likely to be expanded significantly in the next several years, the scope and substance of those standards have not yet been defined.

Under option C, general performance and protectivenes [sic] standards for management of non-hazardous wastes would be established and applied on a case-by-case basis. The objective would be to impose standards of varying levels of stringency, depending on the degree of environmental protection that is warranted (i.e. the amount and nature of hazardous constituents contained in the waste).

While meeting the general standards, the permitting authority would be given a substantial amount of discretion as to what specific design/operating standards would be applied at different units. Such standards could not be less stringent than the minimal Subtitle D standards. In other cases, Subtitle C standards may be appropriate.

From a legal standpoint, neither the language of §3004(u) nor the legislative history to the statute indicate that nonhazardous wastes should be handled in a different manner than hazardous wastes. It is reasonable to assume, therefore, that EPA could exercise some discretion in determining the level of protectiveness necessary to protect human health and the environment in each situation.

This approach affords a desirable measure of flexibility, but results in less consistency across the program. Application of general performance and protectiveness standards may also be difficult to enforce and could lead to extended negotiations with owner/operators in designing remedies.

Recommendation—Option C: Apply appropriate standards on a case-by-case basis.

OSWER recommends Option C, because it believes that in some circumstances Subtitle C restrictions will be necessary to ensure safe handling of "nonhazardous" SWMU waste, while in others they will be unnecessarily restrictive.

U.S. EPA, OUTLINE OF RCRA SUBTITLE D MINING WASTE STRAWMAN (May 31, 1988 DRAFT)

[p. 8]

40 CFR Part xxy: Technical Criteria for Mining Waste Management Facilities and Practices

* * *

[p. 45]

Subpart G: Corrective Action Criteria

A. Corrective action criteria for ground water

1. If concentration of any parameter exceeds ground-water protection standard established under paragraph (A)(6)(g) of Subpart F, owner or operator must:

   a. Establish and implement corrective action ground-water monitoring program that:

      i. At minimum, meets requirements of paragraph (A)(9)(f) of Subpart F; and,

      ii. Demonstrates effectiveness of corrective action; and,

      iii. Demonstrates compliance with ground-water protection standard.

   b. Implement corrective action remedy selected by regulatory authority under paragraph (A)(6)(g) of Subpart F.

   c. Notify all persons who own or reside on land that overlies any part of plume of contamination.

   d. Take any interim measures deemed necessary by regulatory authority to protect human health and environment. To extent technically prac-

tical, interim measures should be consistent with objectives, and contribute to performance of corrective action remedy selected pursuant to paragraph (A)(6)(g) of Subpart F. Regulatory authority may consider following factors in evaluating need for interim measures:

i. Time required to develop and implement final corrective action remedy; and

ii. Actual or potential for exposure to wastes or constituents by humans or environmental receptors; and,

iii. Further degradation of ground water that may occur; and

iv. Meteorological conditions that may cause release or migration of wastes or constituents; and,

v. Other conditions that may pose threats to human health and environment.

2. Regulatory authority may determine, after implementation of corrective action remedy has begun, that compliance with the requirement(s) of the corrective action remedy selected under paragraph (A)(9) of Subpart F is not technically practical. In making such a determination, regulatory authority shall consider:

   a. Owner or operator's efforts to achieve compliance; and

   b. Whether other currently available or new and innovative methods could achieve compliance.

3. If, pursuant to paragraph (2), regulatory authority determines that compliance with requirements of the corrective action remedy is not technically practical, regulatory authority may require owner or operator to:

a. Implement alternate measures to control exposure of humans or environmental receptors to wastes or constituents; and,

b. Implement alternative measures to control sources of contamination or to remove or decontaminate equipment, units, devices, or structures.

4. All wastes that are managed pursuant to implementation corrective action under paragraph (A)(6)(i)(ii) or to an interim measure under paragraph (1)(d) above shall be managed in a manner that:

a. Is protective of human health and environment; and,

b. Complies with applicable Federal, State, and local requirements.

5. Corrective action remedies selected pursuant to paragraph (A)(6)(g) of Subpart F and implemented pursuant to paragraph (A)(6)(i) of Subpart F shall be considered complete when regulatory authority determines that:

a. Compliance with ground water protection standards established under paragraph (A)(6)(g) have been achieved in accordance with the requirements of paragraph (A)(9)(f) of Subpart F; and,

b. All requirements to complete corrective action have been satisfied.

6. Upon completion of corrective action, owner or operator must submit to regulatory authority certification that action is completed in accordance with paragraph (5) above. Certification must be signed by owner or operator and by independent professional in appropriate discipline(s).

7. Upon receipt of certification and after considering other relevant information, regulatory authority may determine that corrective action has been completed. When such determination is made, regulatory authority shall release owner or operator from requirements for financial assurance under paragraph (D) of Subpart I.

B. Corrective action criteria for surface water

1. If concentration of any parameter exceeds surface water protection standard established under paragraph (B)(3)(b)(i) of Subpart F, owner or operator must:

   a. Establish and implement corrective action surface water monitoring program that:

      i. At minimum, meets requirements of paragraph (B)(3) of Subpart F; and,

      ii. Demonstrates effectiveness of corrective action; and,

      iii. Demonstrates compliance with surface water protection standard.

   b. Pursuant to paragraph (B)(5)(b) of Subpart F, implement corrective action remedy selected by regulatory authority under paragraph (B)(4)(b)(ii) of Subpart F.

   c. Notify all users of contaminated surface waters.

   d. Take any interim measures deemed necessary by regulatory authority to protect human health and environment. To maximum extent technically practical, interim measures should be consistent with objectives, and contribute to performance, of corrective action remedy. Regulatory authority may consider the following factors in evaluating need for interim measures:

i. Time required to develop and implement final corrective action remedy; and,

ii. Actual or potential for exposure to wastes or constituents by humans or environmental receptors; and,

iii. Further degradation of surface water that may occur; and,

iv. Meteorological conditions that may cause release or migration of wastes or constituents; and,

v. Other conditions that may pose threats to human health and environment.

2. Regulatory authority may determine, after implementation of corrective action, that compliance with the requirement(s) for the corrective action remedy in paragraph (B)(8)(f) for Subpart F is not technically practical. In making a determination, the regulatory authority shall consider:

   a. Owner or operator's efforts to achieve compliance; and,

   b. Whether other currently available or new and innovative methods could achieve compliance.

3. If regulatory authority determines, pursuant to paragraph (2), that compliance with the requirement(s) for the corrective action remedy in paragraph (B)(8)(f) of Subpart F is not technically practical, regulatory authority may require owner or operator to:

   a. Implement alternate measures to control exposure of humans or environmental receptors; and,

   b. Implement alternative measures to control sources of contamination or to remove or de-

contaminate equipment, units, devices, or structures.

4. All wastes that are managed pursuant to corrective action implemented under paragraph (B)(5)(b) of Subpart F or to an interim measure under paragraph (1)(d) above shall be managed in a manner that:

   a. Is protective of human health and environment; and,

   b. Complies with applicable Federal, State, and local requirements.

5. Remedies selected pursuant to paragraph (B)(4)(b)(ii) of Subpart F and implemented pursuant to paragraph (B)(5)(b) of Subpart F shall be considered complete when regulatory authority determines that:

   a. Compliance with surface water protection standards established under paragraph (B)(4)(b)(i) have been achieved in accordance with the requirements of paragraph (B)(8)(f) of Subpart F; and,

   b. All requirements to complete remedy have been satisfied.

6. Upon completion of remedy, owner or operator must submit to regulatory authority certification that remedy is completed in accordance with paragraph (5) above. Certification must be signed by owner or operator and by independent professional in appropriate discipline(s).

7. Upon receipt of certification and after considering other relevant information, regulatory authority may determine that corrective action remedy has been completed. When such determination is made, regulatory authority shall release owner or

operator from requirements for financial assurance under paragraph (D) of Subpart I.

C. Corrective action criteria for air

1. If emissions from mining waste causes exceedance of any air performance goal established pursuant to paragraph (D)(3) of Subpart D, regulatory authority may require owner or operator to implement corrective action to accomplish any or all of the following goals:

   a. Reduce ambient air concentrations of parameter(s) of concern to performance goals at facility boundary or other location designated by regulatory authority.

   b. Prevent future emissions of air pollutants from violating performance goals.

   c. Prevent future violations of State Implementation Plan approved or promulgated pursuant to section 110 of Clean Air Act, as amended.

2. If corrective action is required under paragraph (1) above, regulatory authority shall select and require implementation of remedy based on site-specific information submitted by owner or operator and other available information. In selecting remedy, regulatory authority may consider:

   a. Ability of remedy to meet performance goal(s) standard(s) through active life, closure, and post-closure care periods;

   b. Potential impacts of the remedy (including safety and cross-media impacts);

   c. Technical feasibility of the remedy; and,

   d. Potential for exposure of human or environmental receptors to ambient air concentration(s) exceeding performance goal(s).

3. Regulatory authority may specify the time in which corrective action must be completed.

4. Regulatory authority may deem corrective action complete when performance goal has been achieved for a period determined by regulatory authority or based on other factors.

No. 89-1511

RECEIVED
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In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN MINING CONGRESS AND SOLITE CORPORATION, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
Acting Solicitor General

RICHARD B. STEWART
Assistant Attorney General

SCOTT A. SCHACHTER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

E. DONALD ELLIOTT
General Counsel

LISA K. FRIEDMAN
Associate General Counsel

CAROLINE H. WEHLING
Acting Assistant General Counsel
Environmental Protection Agency
Washington, D.C. 20460

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly upheld an interpretation by the Environmental Protection Agency of the Resource Conservation and Recovery Act of 1976, under which the corrective action requirement imposed by Section 3004(u) of the Act, 42 U.S.C. 6924(u) (Supp. V 1987), applies to releases of toxic substances from mining, utility, and cement kiln wastes at facilities that treat, store or dispose of hazardous waste.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Chemical Manufacturers Ass'n v. *NRDC, Inc.*, 470 U.S. 116 (1985)	13
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984)	9
Environmental Defense Fund v. *EPA*, 852 F.2d 1309 (D.C. Cir. 1988)	5, 15
Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986)	11
Pennhurst State School v. *Halderman*, 451 U.S. 1 (1981)	11
Public Citizen v. *United States Dep't of Justice*, 109 S. Ct. 2558 (1989)	13
Stafford v. *Briggs*, 444 U.S. 527 (1980)	11
United States v. *Morton*, 467 U.S. 822 (1984)	11
United Technologies Corp. v. *EPA*, 821 F.2d 714 (D.C. Cir. 1987)	6

Statutes and regulations:

Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221	5
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*:	
§ 1004(5), 42 U.S.C. 6903(5)	5
§§ 1002-9010, 42 U.S.C. 6901-6991(i) (1982 & Supp. V 1987)	2
§ 3001, 42 U.S.C. 6921 (1982 & Supp. V 1987)	2, 5
§ 3001(b)(2)(A), 42 U.S.C. 6921(b)(2)(A)	4
§ 3001(b)(2)(B), 42 U.S.C. 6921(b)(2)(B)	4, 17
§ 3001(b)(2)(C), 42 U.S.C. 6921(b)(2)(C)	4

Statutes and regulations—Continued: Page

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§ 3001(b)(3)(A)(ii), 42 U.S.C. 6921(b)(3)(A)(ii) 5
§ 3001(b)(3)(C), 42 U.S.C. 6921(b)(3)(C) .. 4, 17
§§ 3001-3018, 42 U.S.C. 6921-6939(b) (1982 & Supp. V 1987) 2
§ 3002, 42 U.S.C. 6922 (1982 & Supp. V 1987) .. 8
§ 3002-3005, 42 U.S.C. 6922-6925 (1982 & Supp. V 1987) 3
§ 3003, 42 U.S.C. 6923 (1982 & Supp. V 1987) .. 8
§ 3004, 42 U.S.C. 6924 (1982 & Supp. V 1987) .. 3
§ 3004(u), 42 U.S.C. 6924(u) (Supp. V 1987) ..*passim*
§ 3004(x), 42 U.S.C. 6924(x) (Supp. V 1987) .. 7, 15, 16, 17
§§ 3004-3005, 42 U.S.C. 6924-6925 (1982 & Supp. V 1987) 8
§ 3005, 42 U.S.C. 6925 (1982 & Supp. V 1987) .. 3
§ 8002(f), 42 U.S.C. 6982(f) 4, 5, 13
§ 8002(n), 42 U.S.C. 6982(n) 4, 13
§ 8002(*o*), 42 U.S.C. 6982(*o*) 4, 13
§ 8002(p), 42 U.S.C. 6982(p) 4, 5, 13
Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 7, 94 Stat. 2337-2338..... 4
42 U.S.C. 9604 5
42 U.S.C. 9606 5
40 C.F.R. Pt. 261 2
App. VIII 5
52 Fed. Reg. 45,798 (1987) (codified at 40 C.F.R. 264.101) 6

Miscellaneous:

125 Cong. Rec. 13,244 (1979) 13
126 Cong. Rec. (1980):
p. 3361 13
p. 3364 13
43 Fed. Reg. (1978):
pp. 58,946-59,028 3
p. 58,992 3
pp. 59,015-59,016 3

Miscellaneous—Continued: Page

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p. 33,066 3
p. 33,084 3
50 Fed. Reg. (1985):
p. 28,712 6
p. 28,713 ..... 14, 18
51 Fed. Reg. 24,496 (1986) 5, 17
52 Fed. Reg. (1987):
p. 45,788 2
pp. 45,789-45,790 6
p. 45,790 17
H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. (1984) 11, 15, 16
H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976) 2
H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1 (1983) 12
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) 12

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 886 F.2d 390.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1989. Petitions for rehearing and suggestions of rehearing in banc were denied on November 27, 1989 (Pet. App. 27a-29a). On February 15, 1990, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 27, 1990. The petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, a mining industry trade association and a mining firm, challenge EPA's interpretation of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901-6991i (1982 & Supp. V 1987). Section 3004(u) of RCRA, 42 U.S.C. 6924(u) (Supp. V 1987), provides that permits issued to owners and operators of hazardous waste facilities must require the operators to take action to correct releases of certain toxic substances from solid waste units at the facility, whether or not the waste is "hazardous waste" within the meaning of the statute. In regulations issued in 1987, EPA construed this provision to apply to releases from units containing any type of solid waste. 52 Fed. Reg. 45,788. Petitioners contend that the Bevill Amendment to RCRA—which makes special provision for wastes from the mining, utility, and cement kiln industries—should be construed to exempt releases from these types of wastes from the corrective action requirement. The court of appeals upheld EPA's construction. Pet. App. 3a-9a.

1.a. Subtitle C of RCRA, 42 U.C.C. 6921-6939b (1982 & Supp. V 1987), establishes a comprehensive "cradle to grave" regulatory program designed to protect human health and the environment from the risks associated with improper handling, storage, and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 5 (1976). To that end, Section 3001 of RCRA, 42 U.S.C. 6921 (1982 & Supp. V 1987, directs EPA to identify and list those solid wastes that are to be regulated as "hazardous waste" under Subtitle C of RCRA. See 40 C.F.R. Pt. 261. Succeeding sections of Subtitle C provide

for detailed regulation of generators, transporters, and owners and operators of facilities that treat, store, or dispose of these wastes [hereinafter TSD facilities]. 42 U.S.C. 6922-6925 (1982 & Supp. V 1987). In particular, Section 3005 of the Act, 42 U.S.C. 6925 (1982 & Supp. V 1987), requires each owner or operator of a TSD facility to obtain a permit; each such permit incorporates performance standards for the environmentally sound treatment, storage, and disposal of hazardous waste. 42 U.S.C. 6924 (1982 & Supp. V 1987).

In 1978, EPA proposed its first set of comprehensive regulations for the treatment, storage, and disposal of hazardous wastes under Subtitle C of RCRA. 43 Fed. Reg. 58,946-59,028. These proposed regulations identified a number of so-called "special wastes"—cement kiln dust waste; utility waste, including fly ash, bottom ash, and scrubber sludge; waste materials from the extraction, beneficiation, and processing of ores and minerals and other mining waste; and gas and oil drilling muds and oil production brines—that were generated in large volumes, were thought to pose less of a hazard than other hazardous wastes, and were not considered amenable to the control techniques proposed for TSD facilities. *Id.* at 58,992, 59,015-59,016. EPA proposed to apply regulatory requirements to these special wastes that were less stringent than those applicable to other hazardous wastes. *Id.* at 58,992. However, EPA's final hazardous waste management regulations did not distinguish special wastes from other forms of hazardous waste. 45 Fed. Reg. 33,066 (1980). Thus, under those regulations, special wastes would have been subject to the same hazardous waste management requirements as other hazardous wastes. *Id.* at 33,084.

b. In the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 7, 94 Stat. 2337-2338, Congress added subsections 3001(b)(3)(A) and 3001(b)(3)(C), 42 U.S.C. 6921(b)(3)(A), 6921(b)(3)(C), to RCRA. These provisions, often referred to as the Bevill Amendment, temporarily suspended the regulation of cement kiln dust waste, utility waste and mining waste (collectively Bevill wastes) under Subtitle C of RCRA. The Bevill Amendment also directed EPA to undertake studies of Bevill wastes, taking account of various factors specified in the statute, and to submit those studies to Congress. See 42 U.S.C. 6982(f), (n) (*o*) and (p). After submitting a study on a particular form of Bevill waste, EPA was directed either to promulgate regulations under Subtitle C applicable to that waste or to determine that such regulations are unwarranted. 42 U.S.C. 6921(b)(3)(C). In the interim, with exceptions not relevant here, the statute provides that Bevill wastes shall be "subject only to regulation under other applicable provisions of Federal or State law in lieu of" Subtitle C. 42 U.S.C. 6921(b)(3)(A).[1]

EPA has completed some of the studies, reports to Congress, and regulatory determinations required by Sections 3001(b) and 8002 of RCRA with respect to Bevill wastes. In December 1985, EPA completed a study of extraction and beneficiation mining wastes

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[1] Similarly, Sections 3001(b)(2)(A) and 3001(b)(2)(B) of RCRA, 42 U.S.C. 6921(b)(2)(A), 6921(b)(2)(B), referred to as the Bentsen Amendment, temporarily suspended hazardous waste regulation of oil and gas production wastes (Bentsen wastes) and required that those wastes be studied. If EPA determined that the regulation of Bentsen wastes as hazardous wastes was warranted, the regulation was to be authorized by an Act of Congress. 42 U.S.C. 6921(b)(2)(C).

and submitted its report to Congress. See 42 U.S.C. 6921(b)(3)(A)(ii), 6982(f) and (p). Six months later, EPA determined that the regulation of those wastes as hazardous wastes under Subtitle C was not warranted. 51 Fed. Reg. 24,496 (1986). See *Environmental Defense Fund* v. *EPA*, 852 F.2d 1309 (D.C. Cir. 1988).

c. In the meantime, in the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, 98 Stat. 3221, Congress enacted further amendments to Subtitle C. A number of the 1984 amendments provide for stricter controls on the treatment, storage, and land disposal of hazardous waste. In addition, because of concern that TSD facilities could become sites at which costly cleanups would be necessary in the future under the "Superfund" program, see 42 U.S.C. 9604, 9606 (1982 & Supp. V 1987), Congress imposed certain new "corrective action" requirements on owners and operators of those facilities.

Specifically, Section 3004(u), 42 U.S.C. 6924(u) (Supp. V 1987), provides that any permit issued to a TSD facility must require "corrective action for all releases of hazardous waste or constituents from any solid waste management unit at * * * [the] facility * * * regardless of the time at which waste was placed in such unit." This requirement is not limited to releases of substances classified as "hazardous waste" (see 42 U.S.C. 6903(5), 6921 (1982 & Supp. V 1987)) or to releases from the portions of the facility that handle such wastes. Rather, the requirement of corrective action extends to any release of a "hazardous constituent"—any one of a number of chemicals or compounds, listed by EPA in Appendix VIII to 40 C.F.R. Pt. 261, that are known to have adverse effects on humans or other life forms—from any "solid waste management unit" (SWMU)—any unit from which hazardous constituents might mi-

grate (such as containers, tanks, waste piles, landfills, and others), 50 Fed. Reg. 28,712 (1985)—on the site of the TSD facility.[2]

The question presented by the petition is whether, as petitioners contend, the Bevill Amendment requires EPA to recognize an exemption from this requirement for releases of hazardous constituents from Bevill wastes. In 1987, EPA interpreted the statute to preclude such an exemption. After notice and comment, the agency promulgated a regulation under which releases of hazardous constituents from Bevill wastes—like releases from other solid wastes deposited in SWMU's at TSD facilities—would be subject to the corrective action requirements of Section 3004(u). 52 Fed. Reg. 45,798 (1987) (codified at 40 C.F.R. 264.101). In a preamble to the regulation, EPA analyzed the language, legislative history, and purpose of the relevant provisions of RCRA and concluded "that 'Bevill wastes' and oil and gas wastes are subject to the corrective action requirements of section 3004(u) when they are found in solid waste management units at facilities that need permits to manage hazardous wastes." 52 Fed. Reg. 45,789-45,790 (1987).

2. Petitioners were among the parties that sought judicial review of this interpretation of the statute. The court of appeals upheld EPA's interpretation, holding that the Bevill Amendment was "intended merely to protect [Bevill] wastes from undue burdens that might flow from their being overhastily classified as hazardous wastes," but not to "immunize

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[2] EPA has interpreted Section 3004(u) to apply to the entire site under the control of the owner or operator of a TSD facility. In *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 721-723 (1987), the D.C. Circuit upheld that interpretation.

them from burdens concededly imposed by Congress on *non*-hazardous wastes." Pet. App. 3a.

The court explained that "Section 3004(u)'s focus on possible release of hazardous constituents, regardless of the absence of hazardous waste, * * * in no way implicates the concern that gave rise to Bevill-Bentsen: the disruption that would follow if the wastes were improvidently classified as hazardous." Pet. App. 6a. "Both the structure of the regulatory scheme and the legislative history of the Bevill-Bentsen amendments," the court continued, "indicate that it was regulation of those wastes *as* hazardous wastes that Congress sought to restrict." *Id.* at 7a. Indeed, the court explained, those amendments "arose out of the apparent imminence of the wastes' being regulated as subtitle C hazardous wastes," and the studies contemplated by those amendments were "logically irrelevant" to the question whether the Section 3004(u) corrective action requirements should apply to Bevill wastes. *Ibid.*

The court also noted that petitioners' interpretation "would lead to bizarre results": "Not only would it make the imposition of corrective action requirements depend upon the outcome of a logically irrelevant inquiry, but it would elevate Bevill-Bentsen wastes to a privileged position above all other non-hazardous solid wastes." Pet. App. 7a-8a. Finally, the court rejected petitioners' contention that Section 3004(x), 42 U.S.C. 6924(x) (Supp. V 1987), required a different conclusion. Pet. App. 8a.

ARGUMENT

The decision of the court of appeals is consistent with well-established principles of statutory construction and presents no issue of general importance. It does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. As the court of appeals noted, Section 3004(u) "sweeps far more broadly than the rest of Subtitle C." Pet. App. 6a. The subject matter of the Subtitle as a whole is a discrete category of solid wastes—designated by EPA as "hazardous wastes"—that are singled out for comprehensive regulation. Subtitle C and regulations promulgated thereunder provide detailed standards governing the handling of these wastes—by generators (42 U.S.C. 6922 (1982 & Supp. V 1987)), transporters (42 U.S.C. 6923 (1982 & Supp. V 1987)), and owners and operators of TSD facilities (42 U.S.C. 6924-6925 (1982 & Supp. V 1987))—from the time they are created through their ultimate disposal and beyond.

Although Section 3004(u) is aimed at operators and owners of facilities treating, storing, or disposing of hazardous waste, it extends to releases of toxic substances from solid wastes that do not themselves qualify as hazardous wastes and thus are not subject to the Subtitle's comprehensive regulatory scheme. The Section requires the applicant for a permit for a TSD facility to remediate releases of hazardous constituents from any SWMU on the site of the facility, whether or not the release results from hazardous waste. With respect to solid wastes in those SWMU's, the corrective action requirement does not resemble the regulations imposed on hazardous wastes by Subtitle C. In contrast to Subtitle

C's comprehensive "cradle to grave" regulation of hazardous wastes, Section 3004(u) applies to solid wastes only if (1) those wastes are included in an SWMU, (2) the SWMU is part of a TSD facility, and (3) there has been a release of hazardous constituents from the SWMU. Once corrective action for any such release has been completed, Section 3004(u)'s application to the nonhazardous waste in the SWMU is at an end, until such time, if ever, when another release occurs.

The Bevill Amendment, upon which petitioners' statutory argument is based, provides that (until EPA determines whether comprehensive regulation of Bevill wastes is warranted) those wastes shall "be subject only to regulation under other applicable provisions of Federal or State law in lieu of" Subtitle C. 42 U.S.C. 6921(b)(3)(A). Because this provision was enacted in 1980, whereas Section 3004(u)'s corrective action requirement became law in 1984, Congress could not have framed the Bevill exemption with that requirement in view. EPA was thus called upon to construe the statute to determine whether the Bevill Amendment's suspension of Subtitle C's scheme of regulation for hazardous wastes should be extended to include cleanups of releases from Bevill wastes that the statute reached for the first time in 1984—and even then only by virtue of those wastes' presence on the site of a proposed TSD facility.

As the court of appeals determined, EPA's resolution of that issue of statutory construction is reasonable, taking account of the language, legislative history, and purpose of the relevant statutory provisions. Principles recognized in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), therefore require that the agency's construction be upheld.

a. Petitioners' fundamental submission is that there is only one possible reading of the text of the Bevill Amendment. Noting that the Bevill Amendment provides for "regulation" of Bevill wastes under state and federal law "in lieu of" Subtitle C and that Section 3004(u) is located in Subtitle C, they maintain that applicants for permits for TSD facilities cannot be required to take corrective action with respect to releases of hazardous constituents from Bevill wastes at their facilities. See Pet. 11-12. However, this argument rests on the assumption that the effect of the permit requirement is to make Bevill wastes and all other nonhazardous wastes from which hazardous constituents may migrate "subject to * * * regulation" under Subtitle C within the meaning of the Bevill Amendment. 42 U.S.C. 6921 (b)(3)(A).

In the context of RCRA, that reading is not a reasonable one. Section 3004(u) does not regulate solid wastes in SWMU's at TSD facilities as such. Rather, in imposing a requirement on persons seeking a permit for a facility that will treat, store, or dispose of hazardous waste, it functions as a part of a system of regulation of those hazardous wastes. If the facility includes an SWMU from which hazardous constituents have been released, Section 3004(u) requires the owner to agree to take corrective action, as a condition for the issuance of a permit. This requirement is not in any way stated to be contingent on whether the precise source of the particular hazardous release can be identified or, if so, whether that source is itself a hazardous waste. It strains the statutory language to characterize the impact of this particular requirement as a "regulation" of whatever solid wastes may be the source of the release—especially in the context of this statute, which provides for a pervasive system of regulation

applicable to certain specified hazardous wastes.[3] Thus, it is far more reasonable, as the court of appeals concluded, to read the language of the Bevill Amendment to give Bevill wastes an exemption only from that system of regulation—*i.e.*, from "regulation as hazardous waste." Pet. App. 8a.

b. This interpretation of the statute gains overwhelming support from the legislative history and the purpose of the relevant provisions. First, nothing in the legislative history of Section 3004(u) suggests that Congress contemplated that persons seeking permits for TSD facilities would be allowed to overlook any releases of hazardous constituents from SWMU's on their sites. To the contrary, the conference report stated (H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 92 (1984) (emphasis added)):

> The purpose of [Section 3004(u)] is to ensure that *all* facilities which seek a permit under section 3005(c) take *all* appropriate action to control and cleanup [*sic*] *all* releases of hazardous constituents from *all* solid waste management units at the time of permitting the facility. Current EPA regulations do not address *all* releases of hazardous constituents from solid waste management units at facilities receiving permits under section 3005(c). * * * The Conferees believe that *all* facilities receiving permits should be required to clean up *all* releases from *all* units at

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[3] As this Court has frequently emphasized, a reviewing court should not "construe statutory phrases in isolation"; statutes should be "read * * * as a whole." *United States* v. *Morton*, 467 U.S. 822, 828 (1984). The context and structure of the language in the statute are important in determining its intent. See *Offshore Logistics Inc.* v. *Tallentire*, 477 U.S. 207, 220-221 (1986); *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 18-19 (1981); *Stafford* v. *Briggs*, 444 U.S. 527, 535 (1980).

> the facility, whether or not such units are currently active.

It is hard to imagine how Congress could have more forcefully expressed an intention to provide no exemption from Section 3004(u)'s corrective action requirement for any releases at TSD facilities, regardless of the nature of the solid wastes to which those releases might be traced. The Senate and House reports on the provision were equally emphatic.[4] We are aware of nothing in the legislative history of Section 3004(u) that suggests any intention to exempt Bevill wastes from that requirement—and thereby to undercut the essential purpose of Section 3004(u), which was to ensure that TSD facilities would not become sites subject to expensive remedial measures financed by the Superfund. See H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 61 (1983).

The legislative history of the Bevill Amendment, on which petitioners rely (Pet. 17 & n.42), also pro-

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[4] See S. Rep. No. 284, 98th Cong., 1st Sess. 31 (1983) (provision ultimately enacted as Section 3004(u) "requires that corrective action be taken in response to all releases of hazardous waste (or constituents of hazardous waste) from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit, regardless of when the waste was placed in the unit or when the release occurred"); H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 60-61 (1983) ("The Committee believes that all facilities receiving permits should be required to clean up all releases from all units at the facility, whether or not such units are currently active. * * * Unless all hazardous constituents releases from solid waste management units at permitted facilities are addressed and cleaned up the Committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program with little prospect for control or cleanup.").

vides no support for their interpretation. As we have noted, that amendment was passed some four years before Section 3004(u) was enacted. Thus, Congress had no occasion even to consider the relation between the Bevill Amendment and the subsequently enacted corrective action requirement. Further, as the court of appeals observed, the impetus for the Bevill Amendment was the imminent effective date of an EPA regulation whose effect would have been to regulate Bevill wastes *as hazardous wastes.* Pet. App. 7a. Consequently, "the floor discussion of the amendments stressed concern over [those wastes'] regulation as hazardous wastes" and passages cited by petitioners that speak in more general terms "appear amid more precise articulations of the goal as seeking to defer their regulation as hazardous wastes." *Ibid.*[5]

c. As the court of appeals pointed out, petitioners' interpretation "would lead to bizarre results." Pet. App. 7a. See *Public Citizen* v. *United States Dep't of Justice,* 109 S. Ct. 2558, 2566 (1989); *Chemical Manufacturers Ass'n* v. *NRDC, Inc.*, 470 U.S. 116, 124 (1985). Given two TSD facilities whose SWMU's are releasing the same hazardous constituents into the environment and propose to handle the same types of hazardous waste, there is no reason why Congress would have chosen to require only the

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[5] See 126 Cong. Rec. 3361 (1980) (remarks of Rep. Bevill) ("No one will dispute the importance of development of meaningful regulation to deal with the truly hazardous waste products which threaten our communities and the environment."); *id.* at 3364 (remarks of Rep. Staggers) (noting EPA's proposed inclusion of certain special wastes "within the scope of EPA's hazardous waste program"). See also 125 Cong. Rec. 13,244 (1979) (remarks of Sen. Bentsen).

facility whose releases do not emanate from Bevill waste to take corrective action. EPA has construed the "corrective action" requirement to require remediation "only *where necessary to protect human health and the environment.*" 50 Fed. Reg. 28,713 (1985). As the court of appeals indicated, the effect of petitioner's interpretation would be to "elevate Bevill-Bentsen wastes to a privileged position above all other nonhazardous solid wastes" and to allow operation of TSD facilities releasing substances threatening human health or the environment notwithstanding Congress's comprehensive preclusion of that result in Section 3004(u). Pet. App. 8a.

The Bevill Amendment was based upon concern that EPA had insufficient information to determine whether Bevill wastes should be subjected to regulation as hazardous wastes. To assure that large quantities of Bevill wastes were not subjected to possibly unnecessary regulation, EPA was directed to perform studies to fill that information gap. See 42 U.S.C. 6982(f), (n), (*o*) and (p). As outlined by Congress, these studies do not address the problem to which Section 3004(u) is directed—which does not turn on the characteristics of the wastes from which a release has occurred. Thus, as the court of appeals correctly observed, the studies through which the ultimate scope of the exemption for Bevill wastes is to be resolved are "logically irrelevant" to the imposition of corrective action requirements on TSD facilities whose SWMU's contain Bevill wastes. Pet. App. 7a.

In short, EPA's accommodation of Section 3004 (u) and the Bevill Amendment is consistent with the language, legislative history, and purpose of those provisions. The agency's interpretation assures that both the Bevill Amendment and the subsequently

enacted corrective action requirement will play an appropriate role within RCRA's overall regulatory scheme. Under that interpretation, the question whether Bevill wastes will be subjected to regulation as hazardous wastes will be determined by the studies Congress prescribed for that purpose and, at the same time, Congress's evident objective of addressing releases of toxic substances from all solid wastes at TSD facilities will given effect. The principles of *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, *supra*, which petitioners acknowledge control this case (Pet. 11), accordingly require that EPA's interpretation be upheld.

2. Petitioners also maintain that their interpretation of the Bevill Amendment is compelled by Section 3004(x) of RCRA, 42 U.S.C. 6924(x) (Supp. V 1987), a provision allowing EPA to modify certain of the requirements imposed upon owners or operators of TSD facilities—among them the corrective action requirement imposed by Section 3004(u)—in the event that EPA determines that regulation of Bevill wastes is warranted. Pet. 14-17.[6] On its face, Section 3004(x) says nothing on the issue whether Section 3004(u)'s potential applicability to releases from Bevill wastes is a form of Subtitle C "regulation" from which the Bevill Amendment provides an exemption. Nevertheless, petitioners contend that Section 3004(x) impliedly recognizes such an exemption. If Section 3004(u) automatically applies to releases from Bevill wastes located at TSD facilities, they reason, Congress would not have conditioned EPA's authority to tailor the corrective action requirement on the results of the studies and regula-

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[6] *Environmental Defense Fund* v. *EPA*, 852 F.2d at 1312; see also H.R. Conf. Rep. No. 1133, *supra*, at 93.

tory determinations required with respect to those wastes. Pet. 15.

Section 3004(x) does not support an implication as broad as petitioners seek to draw from it. Congress could reasonably have provided EPA with authority to modify some applications of the corrective action requirement to SWMU's at facilities handling those Bevill wastes that EPA might ultimately determine to be hazardous while at the same time refusing to exempt all Bevill wastes contained in any SWMU at any TSD facility from that requirement. Thus, the legislature's decision to allow EPA to tailor the corrective action requirement for SWMU's after EPA had determined whether Bevill wastes were to be regulated as hazardous wastes does not, as petitioner contends, compel the conclusion that Congress wanted to forgo corrective action for releases from all Bevill wastes in the meantime.

The legislative history makes clear that the purpose of Section 3004(x) is to enable EPA to tailor various aspects of the regulatory program applicable to hazardous wastes to Bevill wastes included in that program, and not to provide an exemption from requirements applicable to all solid waste. As the conference report explained (H.R. Conf. Rep. No. 1133, *supra*, at 93):

> [Section 3004(x)] recognizes that even if some of the special study wastes are determined to be hazardous it may not be necessary or appropriate, because of their special characteristics and other factors, to subject such wastes to the same requirements that are applicable to other hazardous wastes, and that protection of human health and the environment does not necessarily imply the uniform application of requirements developed for disposal of other hazardous wastes.

Nothing in this statement of the Section's purpose suggests a willingness to distinguish all Bevill wastes from other solid wastes for purposes of the corrective action requirement. Petitioners' argument that a broader implication should be drawn from Section 3004(x) falls far short of what *Chevron* requires to reject EPA's interpretation of the statute.

3. Petitioners also contend that EPA's interpretation must be rejected because it "circumvents the Congressionally mandated Bevill process" and exposes industry to extreme compliance costs without EPA's having made the determinations required by Sections 3001(b)(3)(C) and 3001(b)(2)(B). Pet. 17-18. That argument is circular; EPA's interpretation can be said to circumvent the review process only if that process addresses the corrective action requirement's application to releases from Bevill wastes at TSD facilities in the first place. For reasons explained at length above, EPA has reasonably determined that the exemption for Bevill wastes (and, correspondingly, the review process) is intended to address "the potential for disruptive economic impacts if these wastes were subject to regulation as hazardous wastes under Subtitle C." 52 Fed. Reg. 45,790 (1987).

For related reasons, the administrative interpretation of the statute upheld by the court of appeals would not "eviscerate" EPA's determination that regulation of extraction and beneficiation wastes under Subtitle C was unwarranted. 51 Fed. Reg. 24,496 (1986). EPA's finding that such wastes should not be subjected to the comprehensive scheme applicable to hazardous wastes did not entail any determination that releases of hazardous constituents from Bevill wastes at TSD facilities should be over-

looked or treated differently from releases from other forms of solid wastes.

Finally, petitioners' claim of economic hardship should be evaluated in light of the program EPA has adopted to implement the corrective action requirement. As we have noted, EPA requires corrective action "only *where necessary to protect human health and the environment.*" 50 Fed. Reg. 28,713 (1985). The nature of that action is determined on a case-by-case basis. The costs of the program thus correspond to the threat posed by actual releases of toxic substances to human health or the environment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

RICHARD B. STEWART
Assistant Attorney General

SCOTT A. SCHACHTER
Attorney

E. DONALD ELLIOTT
General Counsel

LISA K. FRIEDMAN
Associate General Counsel

CAROLINE H. WEHLING
Acting Assistant General Counsel
Environmental Protection Agency

MAY 1990

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* The Solicitor General is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN MINING CONGRESS and SOLITE CORPORATION,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITIONERS' REPLY MEMORANDUM

Of Counsel:
EDWARD M. GREEN, ESQ.
Chief Counsel
RODERICK T. DWYER, ESQ.
Senior Counsel
AMERICAN MINING CONGRESS
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(202) 861-2800

JOHN N. HANSON, ESQ.
Counsel of Record
DONALD J. PATTERSON, JR., ESQ.
AARON H. GOLDBERG, ESQ.
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Petitioner American Mining Congress

JEREMIAH J. JEWETT, III, ESQ.
MCGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219
(804) 774-1005

Attorney for Petitioner Solite Corporation

June 11, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING THE WRIT	2
I. THE DECISION BELOW IGNORES THE REPEATED ADMONITIONS OF THIS COURT THAT REVIEWING COURTS MUST GIVE EFFECT TO THE PLAIN LANGUAGE OF STATUTORY PROVISIONS	3
A. The Decision Below Violates The Plain Language Of The Bevill Amendment	3
B. The Decision Below Cannot Be Reconciled With The Plain Language Of Section 3004(x)	5
II. THE DECISION BELOW UNDERMINES THE PURPOSE OF THE BEVILL AMENDMENT	7
III. THE DECISION BELOW EVISCERATES A PRIOR REGULATORY DETERMINATION BY EPA	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
American Iron and Steel Institute v. United States Environmental Protection Agency, 886 F.2d 390 (D.C. Cir. 1989)	*passim*
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	3
Citizens to Save Spencer Cty. v. United States Environmental Protection Agency, 600 F.2d 844 (D.C. Cir. 1979)	6
Environmental Defense Fund v. United States Environmental Protection Agency, 852 F.2d 1309 (D.C. Cir. 1988)	2,8
Johnson v. Transp. Agency, Santa Clara Cty., Cal., 107 S. Ct. 1442 (1987)	2
Miree v. DeKalb Cty., Ga., 433 U.S. 25 (1977)	4
United States v. Johnson, 107 S. Ct. 2063 (1987)	2
Statutes:	
42 U.S.C. §§ 6921-6939b	2
42 U.S.C. § 6921(b)(3)(A)	2,3
42 U.S.C. § 6921(b)(3)(A)(ii)	8
42 U.S.C. § 6924(u)	9
42 U.S.C. § 6924(x)	2,5,7
Regulations:	
40 C.F.R. § 264.101(a) (1989)	4
51 Fed. Reg. 24,496 (1986)	8,9
52 Fed. Reg. 45,788 (1987)	4
55 Fed. Reg. 16,859 (1990)	4
Miscellaneous:	
Webster's Third New International Dictionary (1981)	4

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PETITIONERS' REPLY MEMORANDUM

The United States Environmental Protection Agency ("EPA" or "the Agency") has filed a brief ("EPA Br.") that attempts to bolster the flawed opinion of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") with meritless arguments never before presented by EPA or the Court of Appeals. This reply clarifies the important issues presented in the Petition for Certiorari of American Mining Congress and Solite Corporation ("Pet.").

REASONS FOR GRANTING THE WRIT

Disregarding the text of a statute to effectuate its "spirit" is probably never justifiable.[1] Certainly, statutory language cannot be ignored where doing so *undermines* the "spirit" of a statute, as well as its plain meaning. Unfortunately, that is what the Court of Appeals did in this case.

Congress explicitly exempted "Bevill wastes" from regulation under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"),[2] pending completion of a special study and Regulatory Determination, because of concerns that such regulation would have devastating economic impacts and would not be warranted in light of the unique nature of Bevill wastes[3] and the fundamental importance to the nation's economy of the industries that generate them.[4] The Court of Appeals, however, ignored the plain language of the statute and allowed EPA summarily to subject Bevill wastes to the single most costly component of Subtitle C—corrective action under section 3004(u), 42 U.S.C. § 6924(u). Indeed, the Court of Appeals allowed EPA to impose these requirements on Bevill wastes despite a prior Regulatory Determination that such regula-

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[1] *See Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 107 S. Ct. 1442, 1472 (1987) (Scalia, J., dissenting) (favoring reversal of a decision that "disregarded the text of [a] statute, invoking instead its 'spirit.' "); *United States v. Johnson*, 107 S. Ct. 2063, 2073 (1987) (Scalia, J., dissenting) (questioning whether a court "can ever be justified in holding . . . that Congress did not mean what it plainly said in [a] statute.").

[2] 42 U.S.C. §§ 6921-6939b.

[3] *See Environmental Defense Fund v. United States Environmental Protection Agency*, 852 F.2d 1309, 1314-15 (D.C. Cir. 1988) ("*EDF v. EPA I*"). Congress in 1984 acknowledged once again that Bevill wastes have "special characteristics." 42 U.S.C. § 6924(x).

[4] Bevill wastes are generated by the mining, utility, and cement kiln industries. *See* 42 U.S.C. § 6921(b)(3)(A). The legislative history of the Bevill exemption stresses the economic importance of these industries. *See* Pet. at 17 n.42.

tions are *not* warranted for certain Bevill wastes. Such a flagrant violation of the language and spirit of a statute that has such serious consequences for the United States economy should not go unchecked by this Court.

I. THE DECISION BELOW IGNORES THE REPEATED ADMONITIONS OF THIS COURT THAT REVIEWING COURTS MUST GIVE EFFECT TO THE PLAIN LANGUAGE OF STATUTORY PROVISIONS

A. The Decision Below Violates The Plain Language Of The Bevill Amendment

The Court of Appeals conceded that "the linguistic case for exemption [of Bevill wastes] from corrective action [under section 3004(u)] is quite powerful."[5] Nevertheless, the Court of Appeals refused to give effect to the plain language of the statute, and instead came to precisely the opposite result. In this way, the Court of Appeals ignored the admonitions of this Court that "[i]f the intent of Congress is clear, that is the end of the matter."[6]

Apparently sensing a fatal weakness in the Court of Appeals' opinion, EPA has invented a new theory to explain why the plain language of RCRA does not compel a reversal by this Court. EPA now argues for the first

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[5] *American Iron and Steel Institute v. United States Environmental Protection Agency*, 886 F.2d 390, 395 (D.C. Cir. 1989) ("*AISI v. EPA*"); Pet. App. at 6a. The Bevill Amendment exempts Bevill wastes from regulation under Subtitle C until EPA completes a special study and makes a Regulatory Determination whether such regulation is warranted. 42 U.S.C. § 6921(b)(3)(A). Section 3004(u) is "indisputably" located in Subtitle C. *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a. Moreover, EPA has never made a Regulatory Determination that regulation of Bevill wastes under section 3004(u) is warranted. In fact, EPA has determined that section 3004(u) regulation is *not* warranted for one class of Bevill wastes. Pet. at 19-21. Thus, under the plain language of RCRA, Bevill wastes are currently exempt from section 3004(u).

[6] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

time that the Bevill Amendment does not apply to section 3004(u), because the Bevill Amendment prohibits the "regulation" of Bevill wastes under Subtitle C, and Bevill wastes are not "regulated" under section 3004(u). EPA Br. at 10.

The Agency is playing word games. The word "regulate" means "to bring under the control of law or constituted authority."[7] There can be no question that section 3004(u) controls solid wastes and the units in which they are managed.[8] Moreover, section 3004(u), like all other Subtitle C requirements, is being implemented through the adoption of regulations.[9]

There is simply no way to read the plain language of the Bevill Amendment to allow Bevill wastes to be regulated summarily under section 3004(u).[10] Thus, despite EPA's claim to the contrary, the decision below is not "consistent with well-established principles of statutory construction."[11]

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[7] Webster's Third New International Dictionary, G. & C. Merriam Co. 1913 (1981).

[8] Indeed, EPA admitted as much in this rulemaking, where the Agency stated that "[one] commenter conceded that [Bevill] wastes are 'solid wastes' subject to corrective action regulation under Subtitle D. . . . It is . . . logical and consistent with Congressional goals to conclude that these solid wastes are similarly subject to . . . section 3004(u)." 52 Fed. Reg. 45,788, 45,790 (1987); Pet. App. at 59a-60a.

[9] *See* 40 C.F.R. § 264.101(a) (1989) (codifying section 3004(u)), Reply App. at 1a; 55 Fed. Reg. 16,859 (1990) (announcing the development of corrective action regulations under section 3004(u)), Reply App. at 2a.

[10] Even if the Bevill Amendment could be read in such a way, EPA's *post hoc* legal theories should not be considered by this Court. *See Miree v. DeKalb Cty., Ga.*, 433 U.S. 25, 33-34 (1977) ("The fact that [a legal theory raised for the first time in this Court] is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed in . . . the Court of Appeals, we will not consider it.").

[11] EPA Br. at 8. EPA also argues that the Bevill Amendment pro-

B. The Decision Below Cannot Be Reconciled With The Plain Language Of Section 3004(x)

The Court of Appeals recognized that its conclusion that Congress in 1984 could have intended Bevill wastes to be automatically subjected to regulation under section 3004(u) is difficult to reconcile with the plain language of section 3004(x), 42 U.S.C. § 6924(x), which authorizes EPA to modify section 3004(u) for Bevill wastes, but only *in the event that* the Agency determines Subtitle C regulation of such wastes is warranted.[12] Therefore, in an effort to "make[ ] sense"[13] of section 3004(x), the Court of Appeals put forth, *sua sponte*, a novel and erroneous interpretation of section 3004(x) that fails to give effect to the plain language of that provision. *See* Pet. at 14-17.

EPA did not advance, and does not endorse here, the Court of Appeals' interpretation of section 3004(x). Instead, EPA has concocted a new and equally meritless theory for reconciling section 3004(x) with its view of the applicability of section 3004(u) to Bevill wastes.[14] According

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hibition on regulation of Bevill wastes under Subtitle C should not apply to section 3004(u) because the corrective action requirement "extends to releases of toxic substances from solid wastes that do not themselves qualify as hazardous wastes and thus are not subject to the Subtitle's comprehensive regulatory scheme." EPA Br. at 8. The Agency is correct that section 3004(u) "sweeps far more broadly than the rest of Subtitle C." *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a. However, that does not alter the fact that section 3004(u) is a Subtitle C requirement, and therefore, by the terms of the Bevill Amendment, cannot be imposed on Bevill wastes in the absence of a Regulatory Determination that such regulation is warranted.

[12] *See AISI v. EPA*, 886 F.2d at 396; Pet. App. at 8a.

[13] *Id.*

[14] Because section 3004(x) is the only RCRA provision that directly addresses the relationship between the Bevill Amendment and section 3004(u), it is remarkable that EPA has waited until this late date to attempt to reconcile section 3004(x) with the Agency's view of the applicability of section 3004(u) to Bevill wastes. In the rulemaking at

to EPA's new theory, section 3004(x) was intended to allow modification of "some applications" of section 3004(u) to solid waste units at facilities where "hazardous" Bevill wastes are managed. EPA Br. at 16. EPA fails to specify what those "applications" might be, and with good reason. There are only two potential options, and each one leads to absurd results.

First, section 3004(x) could have been intended to allow modification of section 3004(u) for units that manage "hazardous" Bevill wastes. Under this theory, however, section 3004(x) would not be available for "non-hazardous" Bevill wastes. As a result, "hazardous" Bevill wastes would potentially be subject to less stringent requirements than "non-hazardous" Bevill wastes. Congress could not possibly have intended such a bizarre result.

Second, section 3004(x) could have been intended to allow modification of section 3004(u) for units that manage "non-hazardous" Bevill wastes at facilities where "hazardous" Bevill wastes are also managed. It would have made little sense, however, for Congress to have provided regulatory relief to "hazardous" Bevill wastes by authorizing EPA to modify the rules for "non-hazardous" Bevill wastes that may, by chance, happen to be located at the same facilities.[15]

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issue, EPA did not so much as mention section 3004(x). Similarly, in its briefs to the Court of Appeals, the Agency mentioned section 3004(x) only in passing. EPA has therefore failed to "properly and faithfully discharge[ ] its responsibility to harmonize [all relevant] statutory provisions." *Citizens to Save Spencer Cty. v. United States Environmental Protection Agency*, 600 F.2d 844, 851 (D.C. Cir. 1979).

[15] Section 3004(x) could have also conceivably been intended to allow modification of section 3004(u) for units that manage *non*-Bevill wastes at facilities where "hazardous" Bevill wastes are managed. Once again, however, this theory would condition regulatory relief for "hazardous" Bevill wastes upon the existence of non-Bevill wastes at the same facilities. Moreover, this theory is precluded by the plain language of section 3004(x), which authorizes EPA to modify section 3004(u) "in

EPA and the Court of Appeals have tried unsuccessfully to "make[ ] sense" of section 3004(x), given their views of the applicability of section 3004(u) to Bevill wastes. In doing so, however, they have ignored the plain language of section 3004(x).[16] That section makes clear that application of section 3004(u) to Bevill wastes is not automatic, but conditioned on a Regulatory Determination, made in accordance with the Bevill Amendment, that such regulation is warranted.[17]

II. THE DECISION BELOW UNDERMINES THE PURPOSE OF THE BEVILL AMENDMENT

Congress' chief concern in enacting the Bevill Amendment was "the potential for disruptive economic impacts" if three industries of vital importance to the United States economy—the mining, utility, and cement kiln industries—became subject to regulation under Subtitle C. Pet. at 17. According to the Court of Appeals, section 3004(u) "in no way implicates the concern that gave rise to [the Bevill Amendment]."[18] EPA similarly states that the Bevill process is "logically irrelevant" to the imposition of section 3004(u) requirements on Bevill wastes.[19]

It is incomprehensible how EPA and the Court of Appeals could have reached these conclusions. Section 3004(u) is by far the single most costly component of Subtitle C. Pet. at 18-19. Congress could not have been con-

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the case of landfills or surface impoundments receiving [Bevill] solid waste[s]." 42 U.S.C. § 6924(x).

[16] Significantly, neither EPA nor the Court of Appeals cited any statutory language or legislative history in support of their novel theories for interpreting section 3004(x). No such support exists.

[17] Of course, in the absence of such a determination, releases from units containing Bevill wastes are subject to all other applicable federal and state regulatory requirements, including RCRA Subtitle D.

[18] *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a.

[19] EPA Br. at 14, *quoting AISI v. EPA*, 886 F.2d at 395; Pet. App. at 7a.

cerned about the economic effects of regulating Bevill wastes under Subtitle C and also be insensitive to the effects of regulating such wastes under the most costly element of that program.

The Court of Appeals worried that if Bevill wastes were not immediately subject to the requirements of section 3004(u), such wastes would effectively be "elevate[d] . . . to a privileged position above all other nonhazardous solid wastes."[20] EPA echoes this theme, asserting that "there is no reason why Congress would have chosen to require [a] facility whose releases do not emanate from Bevill waste to take corrective action" while not requiring a facility whose releases *do* emanate from Bevill wastes to take corrective action. EPA Br. at 13-14.

Both the Court of Appeals and EPA have forgotten that the fundamental purpose of the Bevill Amendment is to place Bevill wastes in a special position with respect to other solid wastes, at least pending completion of the Regulatory Determination process.[21] To deny this special status, as the Court of Appeals has done, is to rewrite the plain language of the Bevill Amendment and section 3004(x), to reject the intent of Congress, and to subject the three Bevill industries to devastating costs without a prior determination that such costs are warranted.

III. THE DECISION BELOW EVISCERATES A PRIOR REGULATORY DETERMINATION BY EPA

In its 1986 Regulatory Determination,[22] which was upheld by the Court of Appeals,[23] EPA decided that regu-

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[20] *AISI v. EPA*, 886 F.2d at 395-96; Pet. App. at 8a.

[21] Indeed, section 3001(b)(3)(A)(ii) of the Bevill Amendment explicitly exempts from Subtitle C regulation "*solid waste* from the extraction, beneficiation, and processing of ores and minerals," pending completion of the Bevill Amendment process. 42 U.S.C. § 6921(b)(3)(A)(ii) (emphasis added).

[22] 51 Fed. Reg. 24,496 (1986); Pet. App. at 48a.

[23] *EDF v. EPA I*, 852 F.2d at 1309.

lation under Subtitle C is not warranted for one category of Bevill wastes—extraction and beneficiation wastes from the mining industry. Pet. at 19-21. EPA now baldly asserts that the 1986 Regulatory Determination did not include a finding that such wastes should be exempt from section 3004(u). EPA Br. at 17-18. The Agency, however, ignores that the 1986 Regulatory Determination spoke broadly about the inappropriateness of "Subtitle C controls" for extraction and beneficiation wastes,[24] and section 3004(u) is "indisputably" a Subtitle C control.[25] Moreover, EPA in the 1986 Regulatory Determination explicitly considered, but decided against, applying section 3004(u), as modified under section 3004(x), to extraction and beneficiation wastes.[26]

The decision of the Court of Appeals therefore eviscerates EPA's 1986 Regulatory Determination and exposes extraction and beneficiation wastes to the most costly component of Subtitle C, even though EPA has already decided that Subtitle C controls are not warranted for such wastes.

CONCLUSION

The Petition for Certiorari should be granted because the decision of the Court of Appeals violates the plain language of RCRA and undermines the special regulatory approach that Congress viewed as an essential safeguard against the unwarranted regulation of three industries of critical importance to the United States economy.

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[24] 51 Fed. Reg. at 24,496; Pet. App. at 48a.

[25] *AISI v. EPA*, 886 F.2d at 395; Pet. App. at 6a.

[26] The 1986 Regulatory Determination addresses modification of the RCRA requirements related to "continuing releases at permitted facilities." 51 Fed. Reg. at 24,500; Pet. App. at 54a. The reference is unquestionably to section 3004(u), which is entitled "Continuing releases at permitted facilities." 42 U.S.C. § 6924(u).

Respectfully submitted,

Of Counsel:
EDWARD M. GREEN, ESQ.
Chief Counsel
RODERICK T. DWYER, ESQ.
Senior Counsel
AMERICAN MINING CONGRESS
1920 N Street, N.W., Suite 300
Washington, D.C. 20036
(202 861-2800

JOHN N. HANSON, ESQ.
Counsel of Record
DONALD J. PATTERSON, JR., ESQ.
AARON H. GOLDBERG, ESQ.
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000

Attorneys for Petitioner
American Mining Congress

JEREMIAH J. JEWETT, III, ESQ.
MCGUIRE, WOODS, BATTLE
& BOOTHE
One James Center
Richmond, Virginia 23219
(804) 774-1005

Attorney for Petitioner
Solite Corporation

June 11, 1990

APPENDIX

INDEX TO APPENDIX

	Page
1. 40 C.F.R. § 264.101(a)	1a
2. 55 Fed. Reg. 16,859 (1990)	2a

CODE OF FEDERAL REGULATIONS
Title 40

* * *

§ 264.101 Corrective action for solid waste management units.

(a) The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.

* * *

Regulatory Agenda
April 23, 1990
55 Fed. Reg. 16,859

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3282. CORRECTIVE ACTION FOR SOLID WASTE MANAGEMENT UNITS (SWMUS) AT HAZARDOUS WASTE MANAGEMENT FACILITIES

Significance: Regulatory Program

Legal Authority: 42 USC 6924 / RCRA 3004(u), 3004(v)

CFR Citation: 40 CFR 264; 40 CFR 270

Legal Deadline: None

Abstract: These regulations set forth the technical and procedural requirements for conducting corrective action to clean up significant releases to air, surface water, ground water and soil at solid waste management units (SWMUs) at operating, closed, or closing RCRA facilities. The regulations will be used to define the structure of the program, and the requirements for implementing remedial action, remedy selection and corrective measures. Currently, the permitting agencies must make case-by-case decisions on action.

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